TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1926

No. 213

READING COMPANY, SUCCESSOR OF PHILADELPHIA & READING RAILWAY COMPANY, PETITIONER,

vs.

JOHN L. KOONS, ADMINISTRATOR OF LESTER M. KOONS

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF PENNSYLVANIA

PETITION FOR CERTIORARI FILED NOVEMBER 23, 1926

CERTIORARI GRANTED JANUARY 3, 1927

(30,713)

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INDEX

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JULY 1, 1925

[fol. 1a] **IN COURT OF COMMON PLEAS OF DAUPHIN COUNTY**

DOCKET ENTRIES

February 6, 1922.—John L. Koons, Administrator of Lester M. Koons, vs. Philadelphia & Reading Railway Co. 222. Geyer, Brady. Summons in Trespass, retble. 27 February inst.

February 7, 1922.—Served summons on deft. by copy to Harry F. Beck, Chief Clerk of the Philadelphia Division of the Philadelphia & Reading Ry. Co. at the office of Supt. at Harrisburg, Pa. So. ans. G. W. K. Shff.

February 6, 1922.—Plaintiff's statement filed.

February 6, 1922.—Service of statement accepted by Jno. T. Brady, Atty. for Deft.

April 1, 1923.—I. L. April 2, 1923. Contd. for cause.

April 2, 1923.—On Petition filed, rule granted on plff. to show cause why judgment of non pros. should not be entered. Retble. in 10 days.

April 5, 1923.—Service of rule accepted by Jno. R. Geyer, Atty. for Plaintiff.

April 14, 1923.—Answer to rule filed.

April 18, 1923.—Continued for cause.

June 7, 1923.—A. L.

July 11, 1923.—The motion of the defendant for judgment of non pros. is overruled. See opinion filed.

October 7, 1923.—I. L.

October 12, 1923.—Stipulation filed.

October 12, 1923.—Trial ordered, jury called, came etc. twelve good and lawful men and women of Dauphin Co., all of whom having been sworn or affirmed according to law, do say October 12, 1923, that [fol. 2a] they find in favor of plaintiff and against defendant in the sum of twenty-five hundred and ten dollars ($2,510) and costs.

October 23, 1923.—Judgment on the verdict.

November 8, 1923.—Certiorari sur appeal No. 11, May Term, 1924, from the Supreme Court recd. and filed.

November 13, 1923.—Bond on appeal filed.

IN COURT OF COMMON PLEAS OF DAUPHIN COUNTY, JANUARY TERM, 1922

No. 222

JOHN L. KOONS, Administrator of Lester M. Koons,

vs.

PHILADELPHIA & READING RAILWAY COMPANY

PETITION FOR JUDGMENT OF NON PROS. AND ORDER THEREON

To the Honorable the Judges of the Court of Common Pleas of Dauphin County:

The petition of Philadelphia & Reading Railway Company, defendant above named, respectfully represents:

That as appears from the statement of claim, filed by plaintiff in the above stated case, Lester M. Koons while in the employ of your petitioner at a place commonly known as Rutherford Yards, Dauphin County, Pennsylvania, on or about the 22d day of April, 1915, sustained injuries from which he died on the same day, or in the early hours of the 23d day of April, 1915.

That on April 20, 1916, John L. Koons and Malinda D. Koons, the surviving parents of the said Lester M. Koons brought their action against your petitioner entered to No. 410 June Term, 1916, Dauphin Common Pleas, to recover for the death of the said Lester M. Koons, [fol. 3a] the suit being under the statutes in force in the Commonwealth of Pennsylvania, wherein a recovery was denied upon the ground that the defendant and the deceased were both engaged in interstate commerce at the time of the happening of the accident, and that no liability existed under the action as instituted.

That the judgment of the said Court of Common Pleas of Dauphin County in favor of your petitioner was affirmed by the Supreme Court upon the first day of July, 1921, the said case being reported in 271 Pa. 468.

That thereafter, upon the 23d day of September, 1921, letters of administration on the estate of Lester M. Koons were duly granted to John L. Koons, the plaintiff above named, by the Register of Wills of Dauphin County, prior to which time no letters of administration or letters testamentary in said estate had been granted to any one.

That on the 6th day of February, 1922, more than 6 years after the death of said Lester M. Koons, the above stated action was instituted against your petitioner to recover for the death of the said Lester M. Koons under the provisions of the statutes of the United States, particularly the Act of Congress of April 22, 1908, and its supplements, known as the Federal Employers' Liability Act.

That section 6 of the Act of April 22, 1908, as amended by the Act of April 5, 1910 (United States Compiled Statutes 1916, section 8662) provides:

"No action shall be maintained under this Act unless commenced within two years from the day the cause of action accrued."

That the above stated action was instituted on February 6, 1922, more than six years after the death of the said Lester M. Koons, on [fol. 4a] which date the cause of action accrued, and is, therefore, barred by the limitation contained in the Act of Congress.

Your petitioner therefore prays that a rule be granted upon the above named plaintiff to show cause why a judgment of non pros. should not be entered in the above stated action because the writ was not issued in time.

Philadelphia & Reading Railway Co., by Jno. T. Brady, Attorney.

Sworn to by John T. Brady; jurat omitted in printing.

And now, April 2, 1923, rule granted on plaintiff as prayed for to show cause why a judgment of non pros. should not be entered. Returnable in 10 days.

By the Court.

Frank B. Wickersham, Judge.

April 5, 1923, service accepted.

Jno. R. Geyer, Attorney for Plaintiff.

[fol. 5a] In Court of Common Pleas of Dauphin County

[Title omitted]

Answer

And now comes John L. Koons, Administrator of Lester M. Koons, the plaintiff in the above entitled proceedings, and to the petition of the defendant under which a rule was granted to show cause why a judgment of non pros. should not be entered because the writ was not issued in time, files this his answer.

The petitioner admits the facts as in the said petition set forth to be true, but avers that the statement thereof does not contain all of the material and relevant matters, and for better statement avers:

1. On or about the 22d day of April, 1915, Lester M. Koons, for whose death this action was brought, while in the employ of defendant, and through the negligence of the defendant, sustained injuries from which he died in the early hours of the 23d day of April, 1915.

2. On the 20th day of April, 1916, John L. Koons and Malinda Koons, the surviving parents of the Lester M. Koons, brought their

action against this defendant in the Court of Common Pleas of Dauphin County to No. 410 June Term, 1916, to recover for the death of the said Lester M. Koons, the action being under the statute in force in the Commonwealth of Pennsylvania.

3. That in the said action to the plaintiff's statement filed the defendant filed no affidavit of defense.

4. That because of the congested state of the trial list this action [fol. 6a] could not come for trial before the first of January, 1917, and during the winter months could not be brought to trial because of the then serious illness of counsel for the plaintiff.

5. That the trial of the cause was begun on the 17th day of May, 1917, and at this trial the defendant produced affirmative proof that the deceased at the time the injuries were sustained was engaged in interstate commerce.

6. That the proof submitted consisted of the records of the Defendant Company in its possession, and of which the plaintiffs in that cause had no knowledge or notice before the trial, that the wreckage which the deceased was at the time of the injury, engaged in unloading from a car which had been shipped from Gettysburg Junction to Harrisburg, was in fact parts of a freight car which had come into the Commonwealth of Pennsylvania from New Jersey empty; had passed through Pennsylvania to Gettysburg on its route home to the Mississippi Central Railroad Company, when it was wrecked at Gettysburg, and then loaded on a car and sent to the yards near Harrisburg for repair and rebuilding.

7. That the jury found as a fact that the deceased was not engaged in interstate commerce and returned a verdict on May 19, 1917, in favor of the plaintiffs and against this Defendant, in the sum of $1,690.00.

8. That upon May 19, 1917, the defendant therein filed its motion for judgment notwithstanding the verdict on the contention that under all the evidence it appeared that the deceased was engaged in interstate commerce, and no recovery could be had.

9. That as soon as the record was transcribed and the vacation season ended, in the month of October, 1917, this matter was argued by counsel.

10. That no decision was reached by the trial judge until April [fol. 7a] 3, 1920, when the verdict was set aside and it was directed that the judgment be entered in favor of the defendant.

11. That the defendant did not upon the said order cause any judgment to be entered in its favor until September 29, 1920, when a judgment was so entered.

12. That upon September 30, 1920, the plaintiffs in that proceeding filed their appeal to the Supreme Court of the Commonwealth of Pennsylvania.

13. That in due course this appeal came to be heard in the said Court in the month of May, 1921.

14. That thereafter upon the 1st day of July, 1921, the Supreme Court of Pennsylvania in an opinion reported in 271 Pa. 468, affirmed the action of the Court below, which was the final determination that the deceased at the time of the injuries sustained was engaged in interstate commerce, as against the verdict of the jury to the contrary.

15. That thereafter a reasonable time was required for the examination of the opinion and the question of law involved on any other proceeding.

16. That upon the 23d day of September, 1921, Letters of Administration on the Estate of Lester M. Koons were duly granted to John L. Koons, plaintiff herein, by the Register of Wills of Dauphin County; and that prior to that time no Letters of Administration in the said Estate had been granted to anyone.

17. That upon the 6th day of February, 1922, the plaintiff herein brought this his action under the provisions of the Statutes of the United States, particularly the Act of April 22, 1908, and its supplements, known as the Federal Employers Liability Act, the plaintiff's statement being upon the same day duly filed.

18. And the plaintiff particularly denies the conclusion of law in the petition for this rule set forth and avers that this present ac-[fol. 8a] tion was commenced within two years from the date the cause of action accrued.

Wherefore, the plaintiff prays that the rule granted to show why a judgment of non pros. should not be entered, because the writ was not issued in time, be dismissed.

John L. Koons, Administrator of Lester M. Koons, by Jno. R. Geyer, Attorney.

In Court of Common Pleas of Dauphin County

[Title omitted]

Opinion

By the Court:

It appears from the allegations in the petition and answer that on April 22, 1915, Lester M. Koons, for whose death this action was brought, while in the employ of the defendant, and through the alleged negligence of the defendant, sustained injuries from which he died the next day; that on the 20th day of April, 1916, John L. Koons and Malinda Koons, the surviving parents of said Lester M.

Koons, brought their action against this defendant in the Court of Common Pleas of Dauphin County to recover for the death of the said Lester M. Koons, under the statute in force in this Common-[fol. 9a] wealth; that to this action the defendant did not file an affidavit of defense; that because of the congested state of the trial list and because of the serious illness of counsel for the plaintiffs the cause was not brought to trial until May, 1917, at which trial the defendant produced affirmative proof that the deceased, at the time the injuries were sustained, was engaged in interstate commerce; that the jury found as a fact that the deceased was not engaged in interstate commerce and returned a verdict May 19, 1917, in favor of the plaintiffs and against the defendant; that upon May 19, 1917, the defendant therein filed its motion for judgment notwithstanding the verdict on the contention that under all the evidence it appeared that the deceased was engaged in interstate commerce and no recovery could be had, which motion was argued in the month of October, 1916; no decision was reached by the trial judge until 1920, when the verdict was set aside and it was directed that the judgment be entered in favor of the defendant; that the defendant did not upon said order cause any judgment to be entered in its favor until September 29, 1920, when judgment was so entered, and on September 30, 1920, the plaintiffs in that proceeding filed their appeal to the Supreme Court of Pennsylvania, which, in due course, heard the appeal in May, 1921, and affirmed the judgment of the court below July 1, 1921; that upon September 23, 1921, letters of administration on the estate of Lester M. Koons were duly granted to John L. Koons, plaintiff herein, by the Register of Wills of Dauphin County, and that prior to that time no letters of administration in said estate had been granted to any one; and on February 6, 1922, the plaintiff herein brought this action under the provisions of the statute of the United States, particularly the Act of April 22, 1908, and its supplements, known as the Federal Employers' Liability Act, the plaintiff's statement being filed upon [fol. 10a] the same day, whereupon the defendant presented its petition April 2, 1923, praying for judgment of non pros. for the reason that it is provided in Section 6 of the Act of April 22, 1908, as amended by the Act of April 5, 1910, (United States Compiled Statutes, 1916, Section 8662) that "no action shall be maintained under this Act unless commenced within two years from the day the cause of action accrued;" that the action accrued at the time of the death of Lester M. Koons, April 23, 1915, and therefore a period of more than two years had expired between the alleged accruing of the action and the date of bringing this suit.

The defendant's answer from which we have quoted largely, denies the legal conclusions for which the plaintiff contends, and the case turns upon the interpretation of the last two words of the Act of Congress of 1908, from which we have quoted, to wit: when the "action accrued."

The decisions upon this question are not uniform. In Bixler et ux. vs. Penna. Railroad, 201 Fed. Reporter, 553, it was held by Federal Judge Witmer that:

"A cause of action under the Employer's Liability Act * * * and supplements thereto, for the death of an employee of a railroad company engaged in interstate commerce, accrues on the death of the employee from the injuries sustained in the service, and not on the appointment of his personal representative, competent and empowered to sue for his death."

The District Court relied for authority for its decision, upon Dodge vs. Town of North Hudson (C. C.) 188 Fed. 492.

The Supreme Court of Georgia in Seaboard Air Line Railway vs. Brooks, 107 S. E. 278, reached the same conclusion, and held that [fol. 11a] an action for damages under the said section six of said Act of Congress is barred by the statute of limitations where it was commenced more than two years after the date of the homicide sued for, but within two years from the date of the appointment of the administratrix. Judge Gilbert, writing the opinion of the Supreme Court of Georgia refers to Bixler vs. Railroad Co., with approval—see page 880. Judge Gilbert also quotes with approval from Tiffany on Death of Wrongful Act, Section 121 (Vide page 879), as follows:

"Inasmuch as the act which creates the limitation also creates the action to which it applies, the limitation is not merely of the remedy but is of the right of action itself. * * * It is certain that no exception can be alleged to excuse the delay."

The Supreme Court of Kansas also reached the same conclusion in the case of Giersch vs. Atchison, T. & S. F. Railway Co., 171 Pac. 591, in which the conflicting opinions upon this subject were discussed by West, J., from which decisions two Judges dissent. This case seemed to turn, however, upon whether the widow who first brought her action in that capacity, which action, it was held by the Supreme Court of Kansas, could not be maintained, could thereafter, upon her appointment as administratrix, be substituted as plaintiff in her fiduciary capacity. Leave was granted to her to amend in the court below whereupon the jury returned a verdict against the defendant for causing the death of plaintiff's intestate. We quote from the conclusion reached by the Judge writing the opinion:

"The Federal statute is not retroactive. It is intended to supersede all other bases of actions wherever applied. It has repeatedly been [fol. 12a] said to be similar to the Lord Campbell Act, and in fixing the limitation at two years it was difficult to conceive that all this time and more might elapse before an administrator might be appointed, and that he would then have two years longer in which to sue which would be the case if the time ran from his appointment and not from the death of the deceased. While, of course, this is a case finally for the Federal Supreme Court, we hold that, in view of the authorities now obtainable, the action must be brought

within two years from the date of the death, and therefore that the administratrix in this case cannot prevail."

Turning now to the contrary view, as held by other eminent authorities, we find the most important case, and the one which we think is controlling, to be American Railroad Co. of Porto Rico vs. Coronas, 239 Fed. Reporter 545. This case was decided by the Circuit Court of Appeals of the First Circuit, March 1, 1916, before Circuit Judges Dodge and Bingham and District Judge Aldrich. The opinion of the court was written by Circuit Judge Bingham. We feel that as the matter involves the construction of a Federal statute the construction placed upon it by the Federal courts should be controlling. We think further that the Coronas case is directly in point. The judgment and decree of the Circuit Court of Appeals is final and conclusive except in the several instances in which an appeal is allowed to the Supreme Court of the United States. On a question of construction of an Act of Congress no appeal lies to the Supreme Court and the action is not reviewable unless the judgment is not made final and the court of appeal especially certifies the matter to the Supreme Court, or unless, under section 240 of the Judicial Code, the Supreme Court specially allows an appeal. The Supreme Court of the United States not having interpreted the sec-[fol. 13a] tion under consideration, we feel bound to follow the decision of the Circuit Court of Appeals in American Railroad Co. of Porto Rico vs. Coronas, supra.

In this case an action under the Federal Employers' Liability Act of April 22, 1908, * * * was brought by Amador Riera Coronas, administrator of the estate of Pedro Didricksen, against the American Railroad Company of Porto Rico in the District Court of the United States for Porto Rico, to recover damages resulting from the death of his intestate, who died on the 8th day of December, 1908, because of injuries which he sustained on the 30th of the preceding November, while employed by the defendant in switching and coupling cars on its railroad. Letters of administration were granted the plaintiff on the 12th of May, 1914, and this action was brought December 17, 1914. There was a trial by jury and a verdict for the plaintiff. An appeal was taken to the United States Circuit Court of Appeals of the First Circuit, the errors assigned being, first, to the overruling of a demurrer to the declaration setting forth that the action was barred in that it was not brought within the two year limitation of Section 6 of the Act. We are not interested in the second bill of error. The substantial question was raised by the first assignment of error, the question being whether the action accrued so that the statute began to run from the death or from the appointment of the administrator, when there was some one in existence who could enforce the liability. The learned Circuit Judge, in writing the opinion of the court—see page 547—proceeds to reason as follows:

"It is to be noted that the statute does not require that the action shall be brought within two years from the death but within two

years from the time the cause of action accrued. It is also to be noted that the action is not for the occurrence out of which the [fol. 14a] death arose, but for the pecuniary damage to the beneficiaries due to the death; so that, in no event could the cause of action arise until after the death, or be said to exist, so that the statute could run until after that time. We may therefore assume that the statute, so far as this cause of action is concerned, did not begin to run until after the death had ensued.

"It is a general rule of law that where a cause of action arises as in this case, after death, it is considered as accruing for the purpose of the running of the statute, only from the time when there is some one in existence capable of suing, and if no one but the administrator can sue, that the statute does not begin to run until administration is granted. This principle was announced at an early day. The leading English case on the subject is Murrey, Administrator, vs. East India Co., 5 Barn. & Ald. 204, which has been very generally followed in this country. It was an action by an administrator, with the will annexed, upon a bill of exchange, made payable to the testator but accepted after death. The acceptance of the bill and the day of payment were more than six years before suit was brought but administration was first taken out less than six years before and it was held that the statute of limitations began to run from the granting of letters of administration, and not from the time the bill became due, as the cause of action did not accrue until there was a party capable of suing."

Judge Bingham supports his conclusion by the citation of very numerous and eminent authorities from some of which we will quote.

In Sanford vs. Sanford, 62 N. Y. 553-554, it was held:

"The term 'cause of action' includes not only the right proper, but [fol. 15a] the existence of a person by or against whom process can issue. A cause of action cannot accrue or exist unless there is a person in esse against whom an action can be brought and the right of action enforced. It is well said that, 'when there is no person to sue there can be no laches.' A case literally within the words of the statute is without its spirit when it is impossible to maintain a suit at law; Richards vs. Maryland Insurance Co., 8 Cranch, 84 (3 L. Ed. 496). It is directly adjudged that the statute does not commence to run against the representative of a deceased creditor upon an obligation incurred, or debt become due after his decease, until administration is granted upon his estate, there being no cause of action until there is a party capable of suing: Murrey vs. East India Co., supra," and other cases cited. "In order to put the statute in motion there must not only be a person in esse to sue, but a person to be sued * * *: Levering vs. Rittenhouse, 4 Wharf. (Pa.) 130" and other cases.

In Levering vs. Rittenhouse, et al., supra, referred to in the last quoted case, it was held.

"If a surety pays the debt of his principal after the death of the latter, and when no letters of administration have been taken out

upon his estate, the statute of limitations does not begin to run until letters of administration are taken out."

In reaching a conclusion in the above stated case—see page 138—Mr. Justice Kennedy reasons as follows:

"But, if Joseph was dead at or before the time his father paid this money, and no letters of administration were taken out upon his estate, then the debt remained in force at the time of the declaration made by his father, because there never having been any person [fol. 16a] such as an executor or administrator in being, of whom this money which had become a debt against the estate of Joseph, could be demanded, or who could be sued for it, the statute of limitation never could be said to have commenced running and consequently could form no bar. It is only where the creditor may and has a right to sue that the statute commences running; but as soon as the moment shall have arrived it commences and nothing can interrupt or prevent it running afterwards: Stanford's Case, 5 Co. 123, cited also in Saffyn vs. Adams, Cro. Jac. 60-1; Cary vs. Stephenson, Salk. 42; Hickman vs. Walker, Wills Report, 29; The East India Co. vs. Murrey's Administrator, 5 B. & A. 204; Geiger vs. Brown, 4 McCord, 423."

Levering vs. Rittenhouse was cited with approval in Benneville Riner, Admr. of Rebecca Riner vs. John Riner, Admr. of George Riner, Deceased, 166 Pa. 617-18, wher-in it was held:

"A cause of action does not exist unless there be a person in existence capable of suing or being sued. When one receives money belonging to the estate of an intestate after his death and before administration granted, the statute runs not from the date of the receipt but from the grant of administration. Where an action is brought by an administrator to recover money paid by an insurance company to a person who had no insurable interest in the life of the plaintiff's intestate, the statute of limitations begins to run only from the date of the grant of letters of administration to the plaintiff. In such a case the fact that there was gross laches in taking out administration does not defeat the right of action."

[fol. 17a] In Marstellar vs. Marstellar, 93 Pa. 350-54, also quoted in the foregoing citation, it was held:

"The statute does not begin to run until a right of action is complete. A cause of action does not exist unless there be a person in existence capable of suing or being sued, "citing Murrey vs. East India Co., supra; Douglas vs. Forrest, 4 Bing. 702; Levering vs. Rittenhouse, supra.

See also Appeal of Amole's Administrators, 115 Pa. 356, in which Marstellar vs. Marstellar is quoted with approval.

In further support of his conclusion, Judge Bingham, in the Coronas case cited—see page 548—Collier vs. Goessling, 160 Fed. 604, 611; 87 C. C. A. 506, wherein Judge Lurton, speaking for the Circuit Court of Appeals for the Sixth Circuit, said:

"To start the running of the statute of limitations there must be some one capable of suing, some one subject to be sued, and a tribunal open for such suits;"

and Fulenweider's Case, 9 Ct. Cl. (U. S.) 403, where it was sought to defeat a contract claim against the government on the ground that it was barred by the statute. The Act of Congress of March 3, 1863, provides "that every claim against the United States, if cognizable by the Court of Claims, shall be forever barred unless a petition setting forth a statement of the claim be filed in the court or transmitted to it under the provisions of this Act within six years after the claim first accrues." It appeared that the contractor died before the claim accrued, the service having been completed June 1, 1861. The petition was not filed until March 13, 1873, but administration was granted December 19, 1870, and it was held:

[fol. 18a] "It is a well settled rule that if, when the right of action would otherwise accrue, and the statute of limitations begin to run, there is no person in existence who is qualified to sue upon that right, the statute does not begin to run till there is such a person: Angell on Limitations, Section 54-63. For this claim none but a personal representative— * * * could sue; and there was no personal representative until December 19, 1870, when the statute began to run, less than three years before this suit was brought."

Judge Bingham then proceeds—on page 548 to 553 inclusive—to quote from the Supreme Courts of Iowa, Illinois, Ohio, Connecticut, Michigan, Missouri and Kentucky, all of which support the conclusion which he has reached, and closes his opinion in the following language—see page 553—

"In Missouri, Kansas and Texas Railway Co. vs. Wulf, 226 U. S. 570, the question as to when the right of action under the statute accrued was not discussed or determined. The point decided was that as the two years' limitation within which an action could be brought, had terminated prior to the time the plaintiff asked leave to appear as administratrix, the desired amendment would not be the introduction of a new cause of action.

"In view of the well recognized rule heretofore pointed out as to when a right of action accrued—which Congress must have had in mind when enacting the present law—and in view of the fact that Lord Campbell's Act upon which the Employers' Liability Act was modeled, expressly provided that the limitation should run from the death of the injured party, and that in the enactment of the present law, Congress declined to adopt such a limitation and fixed the period from the time the action accrued, we are of the opinion that the [fol. 19a] proper construction of the statute is that the right of action did not accrue so that the limitation attached, until the administrator was appointed, and that the demurrer was properly overruled."

As we have before stated, the decisions upon the question at bar are very conflicting, and cannot be reconciled, but we feel that the

great weight of authority is in support of the conclusion reached by the Circuit Court of Appeals of the United States in the Coronas case, and appears to us to be the rule long since adopted by the Supreme Court of Pennsylvania; Levering vs. Rittenhouse, supra.

We conclude, therefore, that the statute of limitations provided for in the Act of Congress did not begin to run until the appointment of the plaintiff as administrator of the deceased; that the action now pending was commenced within the statutory period provided by the Act of Congress, after the appointment of the plaintiff as administrator of the deceased, and therefore the motion of the defendant for judgment of non pros. must be and is hereby overruled. Exception allowed to the defendant.

Frank B. Wickersham, Judge.

IN COURT OF COMMON PLEAS OF DAUPHIN COUNTY

[Title omitted]

PLAINTIFF'S STATEMENT

This action is brought to recover damages from the defendant in a cause of action whereof the following is a more specific statement.

[fol. 20a] 1. The defendant is a corporation incorporated under the laws of the Commonwealth of Pennsylvania.

2. On, about, and before the 22d day of April, 1915 the defendant was engaged in maintaining and operating a railroad in interstate commerce.

3. On or about the 22d day of April, 1915, Lester M. Koons was employed by the said defendant company as a laborer in and about the yards of the said railroad thus being operated by the said defendant at a place near the City of Harrisburg, commonly known as Rutherford Yards.

4. That at the time of the happening of the things hereinafter complained of, as has been judicially determined in a proceeding to No. 410 June Term, 1916 in the Court of Common Pleas of Dauphin County, Pennsylvania, the said Lester Mr. Koons was then engaged in interstate commerce.

5. That being thus employed the said Lester M. Koons was by the said defendant assigned under the charge, supervision and direction of one George Zimmerman.

6. That the said George Zimmerman was the person in charge of and directing the particular work in which the said Lester M. Koons was engaged and to whose orders the said Lester M. Koons was bound to conform.

7. That on the said day the said Lester M. Koons was directed by the said George Zimmerman to undertake the unloading of a certain

wrecked freight car, to wit, Car 519 of the Mississippi Central Railroad Company then upon another car in the yard of the defendant.

8. That the said Mississippi Central Railroad Company freight car was a car of facility then being used in interstate commerce.

9. That the said Lester M. Zimmerman was then and there ordered and directed by his said employer to undertake the work of unloading the said car by means of a crane or tackle.

[fol. 21a] 10. That in the work of so doing the said defendant did carelessly and negligently supply a certain appliance, to wit, a chain with certain "dogs" or hooks attached to be used in the lifting of the said portion of the wrecked car.

11. That the said Lester M. Koons and his fellow servants, being thus directed to use the same or certain of them protested that the said appliance was not the proper appliance and not safe.

12. That it was then and there available certain other appliances, to wit, certain chains which could have been passed around the certain material to be lifted and were the better adapted for the purpose.

13. That they, the said Lester M. Koons and his fellow workmen, or certain of them suggested that these chains be used for the said work.

14. That nevertheless the said defendant did then order, direct and instruct the said Lester M. Koons and his fellow servants to attach and use the said dogs or hooks.

15. That the same being attached, the said defendant did carelessly and negligently order the material thereby to be lifted and did thereupon order the said Lester M. Koons into a dangerous place thus created to assist in so doing.

16. That while the said car or a large part thereof was being lifted one of the dogs or hooks of the said chain slipped thereby causing the load to slip or drop striking the said Lester M. Koons upon the head or body and inflicting upon him serious injuries.

17. That in consequence of the said injuries thus sustained the said Lester M. Koons did, upon the same day, to wit, the 22d day of April, 1915, or in the early hours of the 23d day of April 1915, die.

18. That the said Lester M. Koons died unmarried and without issue.

[fol. 22a] 19. That the said Lester M. Koons died leaving to survive him his father, John L. Koons, who is also the administrator of his estate, and Malinda Koons, his mother.

20. Although over the age of 21 the said Lester M. Koons continued to perform numerous acts of aid and assistance to his parents

and from time to time contributed for their aid, comfort and support, large sums of money.

21. That had he, the said Lester M. Koons, continued to live he would from time to time so long as he lived, or they lived, or either of them, have continued to perform the said acts of service and assistance, and to contribute sums of money to them.

22. That the said Lester M. Koons at the time of his death and before that time was able to earn and did earn sums of money.

23. That by reason of the death of the said Lester M. Koons there was required to be expended large sums of money in the payment of funeral and burial expenses which sums are a claim against his estate and have been paid by the said John L. Koons.

24. That after the death of the said Lester M. Koons, John L. Koons and Malinda Koons, his father and mother, brought their action under the statutes in force in the Commonwealth of Pennsylvania, wherein a recovery was denied upon the ground that the defendant and the deceased were both at the time of the happening of these said events engaged in interstate commerce, and that no liability existed under the statutes or common law in force in Pennsylvania.

25. That the judgment in favor of the defendant in the said court was affirmed upon appeal upon the 1st day of July, 1921

26. That thereafter, to wit, upon the 23d day of September, 1921, [fol. 23a] Letters of Administration in the Estate of Lester M. Koons were duly granted to the plaintiff, by the Register of Wills of Dauphin County.

27. That before the granting of these said Letters of Administration no Letters of Administration or Letters Testamentary against the estate of the said Lester M. Koons had been granted to anyone.

28. Wherefore the plaintiff brings this his action under the provisions of the statutes of the United States for the benefit of the surviving parents of the said Lester M. Koons for such death resulting from the negligence of the defendant, its officers, agents or employees, and by reason of defect or insufficiency due its negligence in its appliances, machinery or other equipment.

29. For these matters the plaintiff claims of the defendant damages in the sum of Ten Thousand Dollars.

30. On all of these matters the plaintiff demands trial by jury.

E. E. Erb, Jno. R. Geyer, Attorneys for Plaintiff.

Sworn to by John L. Koons. Jurat omitted in printing.

[fol. 24a] February 6, 1922, service accepted.

Jno. T. Brady, Attorney for Defendant.

IN COURT OF COMMON PLEAS OF DAUPHIN COUNTY

[Title omitted]

STIPULATION RE VERDICT AND JUDGMENT

And now, October 12, 1923, the Court having discharged the rule for the dismissal of the action for the reason assigned that it was barred by the statute of limitations, and the cause having come on for trial, it is agreed by and between the parties hereto as follows:

1. That a verdict shall be entered in favor of the plaintiff and against the defendant, in the sum of Twenty-five hundred and ten dollars ($2,510) with the same force and effect as though a trial had been had.

[fols. 25a & 26a] 2. That the verdict and the judgment to be entered thereon shall be subject to the exception that the learned Court erred in discharging the said rule and in overruling the motion of the defendant for judgment of non pros., which may be reviewed by an appeal to the Supreme Court of Pennsylvania and the Supreme Court of the United States, if such can be had, without any question that the matters should have been heard upon the trial, which is waived by this agreement.

John R. Geyer, Elmer E. Erb, Attorneys for Plaintiff. Jno. T. Brady, Attorney for Defendant.

IN COURT OF COMMON PLEAS OF DAUPHIN COUNTY

VERDICT

We find in favor of the plaintiff and against the defendant in the sum of Twenty-five Hundred and Ten Dollars ($2,510).

October 12, 1923.

JUDGMENT

Oct. 23, 1923.—Judgment on the verdict.

[fol. 27a] IN SUPREME COURT OF PENNSYLVANIA

No. 222, January Term, 1922

JOHN L. KOONS, Administrator of Lester M. Koons,

vs.

PHILADELPHIA & READING RAILWAY COMPANY, Appellant

Appeal of Defendant from judgment of Common Pleas of Dauphin County

DOCKET ENTRIES

Nov. 8, 1923.—Appeal and affidavit filed.
Eo die.—Exit writ rtble. 21st Monday of the year 1924.
Nov. 10, 1923.—Notice of appeal, etc., filed.
May 23, 1924.—Record filed.
May 24, 1924.—Assignments of error filed.
May 26, 1924.—Argued.
Oct. 6, 1924.—Judgment affirmed. Per Curiam. F.
Oct. 15, 1924.—Petition to hold record filed.

And now, this 16th day of October, A D. 1924, upon consideration of the foregoing petition and upon the representation that the above [fol. 28a] appellant will take the necessary steps to present the case to the Supreme Court of the United States for review it is ordered that the record in the above-entitled case be held by the Prothonotary of this Court and be not remitted to the Court of Common Pleas of Dauphin County until the expiration of forty days from the date hereof.

R. von M., Chief Justice.

Oct. 24, 1924.—Petition for reargument filed.
Oct. 25, 1924.—Reargument refused. R. von M., C. J.

IN SUPREME COURT OF PENNSYLVANIA

[Title omitted]

APPEAL AND AFFIDAVIT—Filed Nov. 8, 1923

Enter Appeal on behalf of Philadelphia & Reading Ry. Co., from the judgment of the Court of Common Pleas of the county of Dauphin.

To William Pearson, Proth'y Sup. Ct. Middle District.

Jno. T. Brady, Attorney.

[fol. 29a] STATE OF PENNSYLVANIA,
County of Dauphin, ss:

John T. Brady, being duly sworn, saith that the above Appeal is not intended for delay, but because he firmly believes that the Appellant suffered injustice by the judgment from which it desires to appeal.

Jno. T. Brady.

Sworn and subscribed before me this 8th day of November, A. D. 1923. Homer Hummel Strickler, Deputy Prothonotary of Supreme Court Middle District. (Seal.)

[File endorsement omitted.]

[fol. 30a] IN SUPREME COURT OF PENNSYLVANIA

[Title omitted]

NOTICE OF APPEAL—Filed Nov. 16, 1923

To Appellee or his Counsel:

You are hereby notified that on November 8, 1923, an appeal was taken to the above court in the above-entitled case.

John T. Brady, Attorney for Appellant.

November 8, 1923. Service of the foregoing notice is hereby accepted; and the Prothonotary of the above court is directed to enter the appearance of the undersigned for the appellee.

Elmer E. Erb & John R. Geyer, Attorneys for Appellee.

NOTE.—Counsel for Appellant should serve the foregoing notice upon the opposite party or his counsel as required by Rule 58 (printed below) and return it with acceptance of service to the office of the Prothonotary, 435 Capitol Building, Harrisburg, Pa., for filing. If necessary under Rule 58, notice should also be served on the judge of the lower court and the stenographer.

[fol. 31a] Rule 58. Immediately upon taking his appeal, appellant shall serve notice thereof on the opposite party or his counsel; and, if the appeal relates to any order, judgment or decree, for which the reasons do not already appear of record, on the judge who entered it; and also, if the official transcript of the evidence needed on the appeal has not been filed, on the stenographer who took it. Upon receipt of such notice, the court below shall forthwith file of record at least a brief statement of the reasons for such order, judgment or decree, in the form of an opinion, which shall be attached to the record and printed; and the official stenographer shall forthwith proceed to have his notes transcribed, approved and filed.

[File endorsement omitted.]

[fol. 32a] IN SUPREME COURT OF PENNSYLVANIA

[Title omitted]

ASSIGNMENTS OF ERROR—Filed May 24, 1924

1. The learned Court erred in overruling the petition of the defendant for judgment of non pros., for the reason that the action is barred by the two year limitation contained in the Act of Congress and in discharging the rule to show cause granted thereon, the prayer of said petition, the rule, and the judgment entered thereon being as follows:

Prayer of Petition

"Your petitioner therefore prays that a rule be granted upon the above named plaintiff to show cause why a judgment of non pros. should not be entered in the above stated action because the writ was not issued in time."

Philadelphia & Reading Railway Company, by Jno. T. Brady, Attorney.

The Rule

"And now, April 2, 1923, rule granted on plaintiff as prayed for to show cause why a judgment of non pros. should not be entered. Returnable in ten days.
By the Court.

Frank B. Wickersham, J.

[fol. 33a] The Judgment Thereon

"We conclude, therefore, that the statute of limitations provided for in the Act of Congress did not begin to run until the appointment of the plaintiff as administrator of the deceased; that the action now pending was commenced within the statutory period provided by the Act of Congress after the appointment of the plaintiff as administrator of the deceased, and therefore the motion of the defendant for judgment of non pros. must be and is hereby overruled. Exception allowed to the defendant."

Frank B. Wickersham, Judge.

2. The learned Trial Judge erred in his conclusion in the opinion filed as follows:

"We feel that as the matter involves the construction of a Federal statute the construction placed upon it by the Federal courts should be controlling. We think further that the Coronas case is directly in point. The judgment and decree of the Circuit Court of Appeals is final and conclusive except in the several instances in which an appeal is allowed to the Supreme Court of the United States. On a

question of construction of an Act of Congress no appeal lies to the Supreme Court and the action is not reviewable unless the judgment is not made final and the court of appeal especially certifies the matter to the Supreme Court, or unless, under section 240 of the Judicial Code, the Supreme Court specially allows an appeal. The Supreme Court of the United States not having interpreted the section under consideration, we feel bound to follow the decision of the Circuit Court of Appeals in American Railroad Co. of Porto [fol. 34a] Rico vs. Coronas, Supra."

For which matters the judgment of the Court below should be reversed.

Jno. T. Brady, Attorney for Appellant.

[File endorsement omitted.]

[fol. 35a] . IN SUPREME COURT OF PENNSYLVANIA

[Title omitted]

OPINION—Filed Oct. 6, 1924

Per CURIAM:

Plaintiff as administrator of the estate of his son Lester M. Koons, sued to recover for the death of the latter, which resulted from injuries received while in the employ of defendant Company. The accident occurred April 22, 1915, at which time both the young man and defendant were engaged in interstate commerce. Death as a result of the injuries received followed on April 23, 1915. Letters of administration, on the son's estate, were granted plaintiff, September 23, 1921, and this action begun by him as such administrator February 6, 1922. On defendant's petition setting forth the facts as above stated a rule was granted on plaintiff to show cause why judgment of non pros. should not be entered for the reason that the action was instituted more than two years after the death, and consequently was barred by the limitation contained in the Federal Employers Liability Act.

Following answer and argument the Court below discharged the rule, plaintiff's contention being that the limitation did not begin to run until the appointment of plaintiff as administrator, and the action having been commenced within the period of two years following such appointment was in time.

[fol. 36a] At the trial, the parties stipulated of record that a verdict should be entered in plaintiff's favor for $2,510.00, subject to the exception that the Court erred in discharging defendant's rule and overruling its motion for judgment of non pros., defendant reserving its rights to an "appeal to the Supreme Court of Pennsylvania and the Supreme Court of the United States, if such can

be had, without any question that the matters should have been heard upon trial which is waived by this agreement." The Court subsequently entered judgment on the verdict and this appeal followed.

The limitation referred to involves the construction to be placed on Section 6 of the Act of Congress of April 22, 1908, as amended by the Act of April 5, 1910, entitled, "an act relating to the liability of common carriers by railroad to their employes in certain cases." (U. S. compiled statutes 1916, Section 8662.) The clause of the section referred to, material here, reads as follows: "No action shall be maintained under this Act unless commenced within two years from the day the cause of action accrued." Whether the "cause of action" arose upon the death of the employe or upon the appointment of an administrator, the sole question for determination here, was before the United States Circuit Court of Appeals in American Railroad Company of Porto Rico vs. Coronas, 230 Federal Reports 545, wherein a judgment was sustained to recover under the Federal Employers Liability Act for the death of an employe in a suit which was not commenced until the appointment of an administrator, more than five years after the employe's death; in construing the limitation section referred to, the Court there said, "It is a general rule of law that where a cause of action arises as in this case, after death, it is considered as accruing for the purpose of the running of the statute, [fol. 37a] only from the time when there is some one in existence capable of suing, and if no one but the administrator can sue, that the statute does not begin to run until administration is granted. This principle was announced at an early day." Since the argument of this case the Circuit Court of Appeals for 3rd district in Guinther, Administratrix vs. Philadelphia & Reading Railway Co. (not yet reported), in passing on the limitation clause here involved where the administratrix was not appointed until six years after death, held the cause of action did "not accrue until the appointment of a personal representative of the deceased who is capable of suing." As the question raised here is identical with that passed upon in the two cases referred to and requires interpretation of a Federal Statute, we will follow the construction placed upon the limitation clause by the two Federal Courts above mentioned and affirm the judgment of the Court below.

Judgment affirmed.

IN SUPREME COURT OF PENNSYLVANIA

[Title omitted]

MINUTE ENTRY OF JUDGMENT

Argued May 26, 1924. Judgment affirmed.

Per Curiam. F.

[File endorsement omitted.]

[fol. 38a] IN SUPREME COURT OF PENNSYLVANIA

[Title omitted]

PETITION TO HOLD RECORD AND ORDER THEREON—Filed Oct. 14, 1924

To the Honorable the Chief Justice and Justices of the Supreme Court of Pennsylvania:

The petition of Reading Company respectfully represents:

That the Philadelphia & Reading Railway Company was the appellant in the above stated case; that on December 31, 1923, the said Philadelphia & Reading Railway Company was merged with your petitioner, that on October 6, 1924 your Honorable Court handed down an opinion affirming the judgment of the Court of Common Pleas of Dauphin County, entered to No. 222 January Term, 1922, which judgment under the merger agreement aforesaid is an obligation of your petitioner.

That the only question involved in the above appeal was the construction of Section 6 of the Act of Congress of April 22, 1908, as amended by the Act of April 5, 1910, entitled "An Act relating to the liability of common carriers by railroad to their employes in certain cases" (U. S. Compiled Statutes 1916, Section 8662), which reads as follows:

"No action shall be maintained under this Act unless commenced within two years from the day the cause of action accrued."

That your Honorable Court in affirming the above stated judgment followed the construction placed upon the limitation clause [fol. 39a] by the Circuit Court of Appeals for the First Circuit and by the Circuit Court of Appeals for the Third Circuit.

That as the question involved is a Federal one, your petitioner desires if possible to have the judgment reviewed by the Supreme Court of the United States.

Your petitioner therefore prays your Honorable Court to extend the time within which under Rule 88 the record is to be remitted to the court from which the appeal was taken to permit your petitioner to take the necessary steps to present the case to the Supreme Court of the United States for review.

And it will ever pray, &c.

Reading Company, by Jno. T. Brady, Attorney.

Order

And now this 16th day of October, A. D. 1924, upon consideration of the foregoing petition and upon the presentation that the above appellant will take the necessary steps to present the case to the Supreme Court of the United States for review it is

Ordered that the record in the above-entitled case be held by the prothonotary of this Court and be not remitted to the Court of Common Pleas of Dauphin County until the expiration of forty days from the date hereof.

R. von M., Chief Justice.

[fol. 40a] [File endorsement omitted.]

IN SUPREME COURT OF PENNSYLVANIA

[Title omitted]

PETITION FOR REARGUMENT—Filed Oct. 24, 1924

To the Honorable the Chief Justice and Justices of the Supreme Court of Pennsylvania:

The petition of Reading Company respectfully represents:

[fol. 41a] That the Philadelphia & Reading Railway Company was the appellant in the above stated case; that on December 31, 1923, the said Philadelphia & Reading Railway Company was merged with your petitioner; that on October 6, 1924, your Honorable Court handed down an opinion, copy of which is hereto attached, affirming the judgment of the Court of Common Pleas of Dauphin County, entered to No. 222 January Term, 1922, which judgment under the merger agreement aforesaid is an obligation of your petitioner.

That the only question involved in the above appeal was the construction of Section 6 of the Act of Congress of April 22, 1908, as amended by the Act of April 5, 1910, entitled "An Act relating to the liability of common carriers by railroad to their employes in certain cases" (U. S. compiled Statutes 1916, Section 8662), which reads as follows:

"No action shall be maintained under this Act unless commenced within two years from the day the cause of action accrued."

Your Honorable Court in affirming the above stated judgment followed the construction placed upon the limitation clause by the Circuit Court of Appeals for the First Circuit in American Railroad of Porto Rico vs. Coronas, 230 Federal, 545, and by the Circuit Court of Appeals for the Third Circuit in Guinther, Administratrix, vs. Philadelphia & Reading Railway Company, not yet reported, holding that the two years' limitation fixed by the Act of Congress does not begin to run until administration is granted on the estate of the deceased employe; that your Honorable Court based your conclusion apparently solely upon the fact that as the case required the interpretation of the Federal statute, the construction placed upon the limitation clause by the two Federal Courts should be controlling; [fol. 42a] that under the provisions of Section 6 of the said Act of Congress the jurisdiction of the courts of the United States is con-

current with that of the courts of the several states, and since the passage of the Workmen's Compensation Law the said Act of Congress is the controlling statute in all actions properly brought against interstate carriers to recover damages for personal injury or death resulting from negligence; that your petitioner is advised that the judgment of the Circuit Court of Appeals for the Third Circuit in the Guinther case is not such a final order as will permit a review of the decision by the Supreme Court of the United States at this time; that as the decision of your Honorable Court in the present case does not draw in question the validity of the Act of Congress referred to, but merely the construction to be placed upon the limitation clause, a writ of error from the Supreme Court of the United States is not allowable: Dana v. Dana, 250 U. S. 220; Philadelphia & Reading Coal & Iron Co. v. Gilbert, 245 U. S. 162; that a review of this decision, therefore, by the Supreme Court of the United States can be had only if the Supreme Court of the United States grants a writ of certiorari and that if such writ be denied the decision of your Honorable Court will stand as the law of Pennsylvania in all cases brought under the Federal Employers' Liability Law, notwithstanding the fact that there has been no decision by a Federal Court that is binding upon your Honorable Court; that the principle involved in this appeal is of the utmost importance to your petitioner and all other railroads of the State.

That your Honorable Court extended the time within which the record is to be remitted to the Court of Common Pleas of Dauphin County for forty days from October 16th.

[fol. 43a] Your petitioner therefore prays your Honorable Court to grant a reargument in the above stated appeal and to reconsider the decision heretofore reached.

And it will ever pray.

Reading Company, by Jno. T. Brady, Attorney.

Sworn to by John T. Brady; jurat omitted in printing.

[fol. 44a] Reargument refused

R. von M., C. J.

[File endorsement omitted.]

Commonwealth of Pennsylvania,
County of Dauphin, ss:

In Supreme Court of Pennsylvania

Clerk's Certificate

I, William Pearson, Prothonotary of the Supreme Court of Pennsylvania, in and for the Middle District thereof, the said Court being a Court of Record, do hereby certify that the foregoing is a true and correct Copy of the Record in the case of John L. Koons, Administrator of Lester M. Koons, Plaintiff, vs. Philadelphia & [fol. 45a] Reading Railway Company, Defendant, at No. 11, May

Term, 1924, as printed for the use of the Supreme Court of Pennsylvania, together with the proceedings in the said Supreme Court, in the case there stated: and I do hereby further certify that the foregoing has been compared by me with the original record in said cause in my keeping and custody as the Prothonotary of said Court, and that the foregoing is a correct transcript from said record.

In testimony whereof, I have hereunto set my hand and affixed the seal of the said Court at Harrisburg, in the County of Dauphin, in the said Middle District of Pennsylvania, this 25th day of November in the year of our Lord One Thousand Nine Hundred and Twenty-Four.

William Pearson, Prothonotary. (Seal of the Supreme Court of Pennsylvania, 1776.)

In Supreme Court of Pennsylvania

Judge's Certificate to Clerk

I. Robt. von Moschzisker, Chief Justice of the Supreme Court of Pennsylvania, being the highest court of law or equity of the said State, do certify that William Pearson by whom the annexed record, certificate and attestation were made and given, and who, in his own proper handwriting, thereunto subscribed his name and affixed the seal of the Supreme Court of Pennsylvania, was at the time of so doing and now is Prothonotary in and for the Middle District of said Court, duly commissioned and qualified; to all of whose acts, [fol. 46a] as such, full faith and credit are and ought to be given, as well in Courts of Judicature as elsewhere, and that the said record, certificate and attestation are in due form of law and made by the proper officer.

Rob't von Moschzisker, Chief Justice of the Supreme Court of Pennsylvania. (Seal of the Supreme Court of Pennsylvania, 1776.)

Commonwealth of Pennsylvania,
County of Dauphin, ss:

In Supreme Court of Pennsylvania

Clerk's Certificate to Judge

I, William Pearson, Prothonotary of the Supreme Court of Pennsylvania, in and for the Middle District thereof, do certify that the Honorable Robt. von Moschzisker, by whom the foregoing attestation was made, and who has thereunto subscribed his name, was at the time of making thereof and still is Chief Justice of the Supreme Court of Pennsylvania, duly commissioned and qualified; to all of

whose acts, as such, full faith and credit are and ought to be given, as well in Courts of Judicature as elsewhere.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court this 25th day of November, A. D., 1924.

William Pearson, Prothonotary. (Seal of the Supreme Court of Pennsylvania, 1776.)

[fol. 47a] SUPREME COURT OF THE UNITED STATES

On Petition for Writ of Certiorari to the Supreme Court of the State of Pennsylvania

ORDER GRANTING PETITION FOR CERTIORARI—Filed Jan. 5, 1925

On consideration of the petition for a writ of certiorari herein to the Supreme Court of the State of Pennsylvania, and of the argument of counsel thereupon had,

It is now here ordered by this Court that the said petition be, and the same is hereby, granted, the record already on file as an exhibit to the petition to stand as a return to the writ.

(6911)

No. [redacted] 213 October Term, [redacted] 192[redacted]

IN THE

Supreme Court of the United States

READING COMPANY, SUCCESSOR OF PHILADELPHIA & READING RAILWAY COMPANY,
Petitioner,

vs.

JOHN L. KOONS, ADMINISTRATOR OF LESTER M. KOONS, *Respondent.*

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF

JOHN T. BRADY,
CHARLES HEEBNER,
Counsel for Petitioner,
No. 18 N. Third St.,
Harrisburg, Pa.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1924. NO.

READING COMPANY, SUCCESSOR OF PHILADELPHIA & READING RAILWAY COMPANY, *Petitioner,*

vs.

JOHN L. KOONS, ADMINISTRATOR OF LESTER M. KOONS, *Respondent.*

To the Honorable, the Supreme Court of the United States:

The petition of Reading Company respectfully shows to the Court as follows:

1. The question of law involved in this case is as follows:

> In an action against an interstate carrier, instituted under the provisions of the Federal Employers' Liability Act by an administrator to recover for the death of an employe of defendant, killed while engaged in interstate commerce, does the two years' limitation fixed by the act of Congress begin to run from the date of death of such employe or from the date of the appointment of the administrator?

2. This is an action in trespass instituted in the Court of Common Pleas of Dauphin County, Pennsylvania, on February 6, 1922, by John L. Koons, Administrator of Lester M. Koons, against the Philadelphia & Reading Railway Company to recover for the death of the said Lester M. Koons, who, while in the employ of the said Company at a place commonly known as Rutherford Yards, Dauphin County, Pennsylvania, on or about the 22nd day of April, 1915, sustained injuries from which he died on the same day or in the early hours of the 23rd of April, 1915. The suit was brought under the provisions of the Act of Congress of April 22, 1908, c. 149 (35 Stat. 65, U. S. Compiled Stats. 1916, Section 8657) entitled, "An Act relating to the liability of common carriers by railroad to their employes in certain cases," for the benefit of the surviving parents, John L. Koons and Malinda D. Koons, the said John L. Koons being the Administrator of the estate. The case involves the construction of Section 6 of the said Act of Congress of April 22, 1908, c. 149, as amended by the Act of April 5, 1910, c. 143 (35 Stat. 66, 36 Stat. 291; U. S. Compiled Stats. 1916, Section 8662), which reads as follows:

> "No action shall be maintained under this Act unless commenced within two years from the day the cause of action accrued."

3. On April 20, 1916, the said John L. Koons and Malinda D. Koons, as surviving parents of the said Lester M. Koons, brought their action against the Philadelphia & Reading Railway Company in the Court of Common Pleas of Dauphin County, to recover for the death of said Lester M. Koons, the suit being under the statutes in force in the Commonwealth of Pennsylvania. In that action, before the close of plaintiffs' case, defendant specifically called attention to the fact that both the Company and the deceased were

engaged in interstate commerce at the time Koons met his death, and that therefore the only right of action was under the Federal Employers' Liability Law, which required that the suit be in the name of a personal representative. No motion to amend with respect to the parties plaintiff was made, the plaintiffs electing to stand on the suit as brought, contending that the decedent was not engaged in interstate commerce at the time of the accident. In this proceeding, the trial court on April 3, 1920, entered judgment in favor of the defendant n. o. v. on the ground that decedent had been so engaged in interstate commerce when injured and that there could be no recovery in a suit instituted by his surviving parents. This judgment was affirmed by the Supreme Court of Pennsylvania on appeal on July 1, 1921, the decision being reported in 271 Pa. 468, 114 Atlantic 262. It was thus definitely determined that any recovery for the death of the said Lester M. Koons could be had only under the provisions of the Federal Act.

Thereafter, on September 23, 1921, the said John L. Koons, the father of decedent, and one of the plaintiffs in the above recited proceedings, took out letters of administration on the estate of his son, and on February 6, 1922, more than six years after the death of the said Lester M. Koons, brought this suit.

The defendant thereupon presented its petition, setting forth all of the pertinent facts and praying that judgment of non pros. be entered for the reason that the action, instituted more than two years after the date of death, was barred by the limitation contained in the Act of Congress, upon which petition a rule was granted upon plaintiff to show cause why the judgment prayed for should not be entered. Plaintiff answered, averring that the action was commenced within two years from the date the cause of action accrued, and praying that the rule be discharged. After

argument the Court of Common Pleas discharged the rule absolutely and overruled the motion for judgment of non pros., holding that the limitation contained in the Act of Congress did not begin to run until the appointment of the plaintiff as administrator and that the action was commenced within the statutory period after such appointment.

When the case came on for trial on the merits, plaintiff and defendant stipulated of record that, subject to the legal question involved, under the exception noted, with the right of appeal reserved, a verdict should be taken in favor of the plaintiff and against the defendant in the sum of $2510. Accordingly a verdict was rendered in the amount stated, upon which, on October 23, 1923, judgment was entered, from which an appeal was taken to the Supreme Court of Pennsylvania, which Court on October 6, 1924, affirmed the judgment of the Court of Common Pleas. On October 25, 1924, the Supreme Court refused a petition for reargument.

4. That after the above recited judgment had been entered against the said Philadelphia & Reading Railway Company, and after an appeal had been taken to the Supreme Court of Pennsylvania, the said Philadelphia & Reading Railway Company was on December 31, 1923, merged with Reading Company, your petitioner, under the final decree of the United States District Court for the Eastern District of Pennsylvania, pursuant to the mandate of your Honorable Court in the case of United States of America *vs.* Reading Company, et al., 253 U. S. 26, and that under the merger agreement the said judgment is an obligation of your petitioner.

5. Your petitioner avers that the judgment of the Supreme Court of Pennsylvania is the judgment of the highest court of the Commonwealth of Pennsylvania and is final, and denies to your petitioner a right, priv-

ilege and immunity under the limitation clause of the Federal Employers' Liability Act, which was duly set up and claimed in the Court of Common Pleas of Dauphin County and in the Supreme Court of Pennsylvania.

6. Your petitioner presents herewith as part of this petition a certified copy of the record, including the proceedings in the Supreme Court of Pennsylvania.

7. That the question involved has not been passed upon by your Honorable Court, although it seems to have been taken for granted in Mo. K. & T. Co. *vs.* Wulf, 226 U. S. 570, that the limitation began to run from the time death occurred and not from the time letters of administration were taken out.

8. That the Circuit Court of Appeals for the First Circuit in American Railroad of Porto Rico *vs.* Coronas, 230 Fed. 545 (1916) and the Circuit Court of Appeals for the Third Circuit in Guinther, Administratrix, *vs.* Philadelphia & Reading Railway Company,— 1 Fed. (2d) 85 (1924), have held that a cause of action for death under the Act does not accrue until the appointment of a personal representative, and the Supreme Court of Pennsylvania in affirming the judgment in the present case, solely because it required the interpretation of the Federal statute, followed the construction placed upon the limitation clause by the Federal Courts in the cases cited; that your petitioner is advised that the judgment of the Circuit Court of Appeals for the Third Circuit in the Guinther case is not such a final order as will permit a review of the decision by your Honorable Court at this time.

9. That by the provisions of Section 6 of the Federal Employers' Liability Act, as amended by the Act of April 5, 1910, c. 143, Sec. 1. (36 Stat. 291, U. S. Compiled Stats. 1916, Sec. 8662) the jurisdiction of the Courts of the United States is concurrent with that of the Courts of the several states; that there is a con-

flict between the decisions of the Federal Courts of Appeal and the State Courts construing the limitation clause of the Act, as at least two State Courts of last resort, the Supreme Court of Kansas in Giersch *vs.* A. T. & S. F. R. R. Co., 171 Pac. 591, (1918), and the Supreme Court of Georgia in Seaboard Air Line *vs.* Brooks, 107 S. E. 878 (1921), declined to follow the doctrine announced by the Circuit Court of Appeals for the First Circuit in the Coronas case (the Guinther case not yet having been decided), and took the contrary view that the cause of action accrued upon the death of the employe.

10. Your petitioner is advised that the Supreme Court of Pennsylvania was in error in affirming the judgment entered in this case, for the reason that the Federal Employers' Liability Act created a new liability, gave an action to enforce it unknown to the common law, and fixed the time within which that action must be commenced, and the limitation clause contained in that Act is not the ordinary statute of limitations dealt with in the cases relied upon as authority by the Federal Courts of Appeal. As the action was not commenced within two years from the date of death, the day the cause of action accrued, it was barred by the statute, and unless your Honorable Court shall correct the error of the court below, your petitioner will be deprived of immunity under the limitation clause of the said Act in this case, and it, as well as all other interstate carriers, will be denied immunity in all similar cases hereafter brought in the State of Pennsylvania.

Wherefore, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Court, directed to the Supreme Court of the State of Pennsylvania, commanding that court to certify and send to this Court, on a day certain to be therein designated, a full and complete transcript of the rec-

ord and all proceedings of the said Supreme Court of Pennsylvania in the said case, which was entitled in that Court, John L. Koons, Administrator of Lester M. Koons, *vs.* Philadelphia & Reading Railway Company, Appellant, Middle District of Pennsylvania, No. 11 May Term, 1924, to the end that the said case may be reviewed and determined by your Honorable Court, as provided by law, and that your petitioner may have such other and further relief or remedy in the premises as to this Court may seem proper, and that the said judgment of the said Supreme Court of Pennsylvania may be reversed by this Honorable Court.

Reading Company,
By
J. V. Hare,
Secretary.

Chas. Heebner,
Counsel for Petitioner.

State of Pennsylvania,
City of Philadelphia, } *ss:*

J. V. Hare, being duly sworn, says that he is Secretary of Reading Company, petitioner above named, that he has read the foregoing petition and knows the contents thereof, and that the facts therein stated are true to the best of his knowledge, information and belief.

J. V. Hare.

Sworn and subscribed to
before me this 25th day
of November, 1924.

Albert W. Tuttle
Notary Public
Commission expires March 26, 1927.

[Seal]

No. October Term, 1924

IN THE

Supreme Court of the United States

READING COMPANY, SUCCESSOR OF PHILADELPHIA & READING RAILWAY COMPANY,
Petitioner,

vs.

JOHN L. KOONS, ADMINISTRATOR OF LESTER M. KOONS, *Respondent.*

BRIEF FOR PETITIONER ON APPLICATION FOR WRIT OF CERTIORARI

JOHN T. BRADY,
CHARLES HEEBNER,
Counsel for Petitioner,
No. 18 N. Third St.,
Harrisburg, Pa.

CASES CITED

In The

Supreme Court of the United States

October Term, 1924. No.

READING COMPANY, SUCCESSOR OF PHILADELPHIA & READING RAILWAY COMPANY,
Petitioner,

vs.

JOHN L. KOONS, ADMINISTRATOR OF LESTER M. KOONS, *Respondent.*

PETITIONER'S BRIEF ON APPLICATION FOR WRIT OF CERTIORARI

The question involved in this case is as follows:

In an action against an interstate carrier, instituted under the provisions of the Federal Employers' Liability Act by an administrator to recover for the death of an employe of defendant, killed while engaged in interstate commerce, does the two years' limitation fixed by the act of Congress begin to run from the date of death of such employe or from the date of the appointment of the administrator?

The determination of this question requires the construction of Section 6 of the Act of Congress of April 22, 1908, as amended by the Act of April 5, 1910, entitled "An Act relating to the liability of common carriers by railroad to their employes in certain cases" (35 Stat. 66; 36 Stat. 291; U. S. Compiled Statutes 1916, Section 8662), which reads as follows:

> "No action shall be maintained under this Act unless commenced within two years from the day the cause of action accrued."

Under this Act an action to recover damages for death must be in the name of a personal representative of the deceased.

American R. R. of Porto Rico *vs.* Birch, 224 U. S. 547, St. Louis S. F. & T. R. R. *vs.* Seale, 229 U. S. 156.

This suit, brought by the Administrator under the Federal Act, is an entirely different action from the suit of John L. and Malinda D. Koons, instituted by them as surviving parents under the state law, and cannot in any way be tacked on to that proceeding.

Giersch *vs.* Railroad, 171 Pac. 591, 596.

> "An action by a widow in her individual capacity under the state law is an entirely different action from the one brought by her as Administratrix under the Federal Employers' Liability Act."
>
> Troxel *vs.* D. L. & W. R. R. 227 U. S. 434.

Under Pennsylvania practice, whether the claim was barred by the limitation clause contained in the Act of Congress was properly raised by the rule to show cause why judgment of non pros. should not be entered because the writ was not issued in time: Prettyman *vs.* Irwin, 273 Pa. 522; 117 Atlantic 195.

While the exact question as to when a cause of action for death accrues under the Federal Act has not been passed upon by your Honorable Court, in at least one case it was assumed that the statute began to run from the date of death and not from the time of the issuance of letters on the estate of decedent.

In Roberts on Federal Liability of Carriers, Volume 2, Page 1142, the learned author says:

> "Whether an action under the Federal act must be brought within two years of the date of death of an employe or within two years from the appointment of an administrator, has not been specifically decided by the national Supreme Court; though it seems to have been taken for granted in Missouri K. & T. R. Co. *v.* Wulf that the statute began to run from the time the death occurred."

In the Wulf case referred to, reported in 226 U. S. 570, plaintiff in her individual capacity instituted suit on January 23, 1909, to recover for the death of her son, who was killed on November 27, 1908. On January 4, 1911, or more than two years after date of death, plaintiff took out letters of administration on the estate of her son, and amended her pleadings by changing the party plaintiff from Sallie C. Wulf to Sallie C. Wulf, Administratrix. Under the facts of the case, and in view of the averments contained in the original petition, the Court held that the amendment was not "equivalent to the commencement of a new action, so as to render it subject to the two years' limitation prescribed by Section 6 of the employers' liability act." Clearly, therefore, this Court in that case assumed that the two year limitation ran from the date of death and not from the time letters were taken out, as the amended petition was filed within a few days after the appointment of the Administratrix. It is noted in the

report of the decision that Mr. Justice Lurton "entertains doubts as to whether the two years' limitation does not apply."

The decisions construing Section 6 of the Federal Act, when the question has been squarely raised as to when the cause of action for death accrues, are not uniform.

The leading case, holding that the limitation does not begin to run until the appointment of a personal representative, and the one which the trial court regarded as controlling, is American Railroad of Porto Rico *vs.* Coronas, 230 Fed. 545, decided by the Circuit Court of Appeals for the First Circuit in 1916. In that case, after reviewing numerous authorities, the Court concludes:

> "In view of the well recognized rule heretofore pointed out as to when a right of action accrued—which Congress must have had in mind when enacting the present law—and in view of the fact that Lord Campbell's Act upon which the Employers' Liability Act was modeled, expressly provided that the limitation should run from the death of the injured party, and that in the enactment of the present law Congress declined to adopt such limitation and fixed the period from the time the action accrued, we are of opinion that the proper construction of the statute is that the right of action did not accrue so that the limitation attached, until the administrator was appointed, and that the demurrer was properly overruled."

The "well recognized rule," to which the Court refers, is founded upon the doctrine laid down in an old English case, Murray, Admr. *vs.* East India Company, 5 Barn. & Ald. 204. This was an action by an administrator with the will annexed upon a bill of exchange

made payable to the testator, but accepted after his death. The acceptance of the bill and the date of payment were more than six years before suit was brought, but administration was first taken out less than six years before, and it was held that the statute of limitation began to run from the granting of the letters of administration, and not from the time the bill became due. The Court points out that at the date of acceptance, or the date of payment of the bill, there was no person in existence who could acquire a right of action by the acceptance and non-payment. In reaching its conclusion, the Court said:

> "Now, independently of authority, we think that it cannot be said that a cause of action exists, unless there be also a person in existence capable of suing."

This is the basis of the decision. The debt was due to the estate, and any recovery would be for the benefit of the estate, to be distributed with other assets in accordance with the provisions of the testator's will, but until an administrator c. t. a. was appointed, there was no person capable of suing, no person who could be guilty of laches in not suing.

It is respectfully submitted that the Circuit Court of Appeals in the Coronas case erred in following the doctrine of the Murray case. The Murray case was on contract, based upon a valid consideration. The debt was due to the estate, but until the administrator was appointed there was no person in a position to institute suit and protect the estate. There was no person to whom laches could be imputed. In the Coronas case, the right to recover was based upon proof of negligence of the character described in Section 1 of the Federal Employers' Liability Act, and proof that there were beneficiaries within one of the classes designated by the statute, who had suffered pecuniary loss by reason

of the death by wrongful act. The intestate of Coronas at death left his father and mother as surviving statutory beneficiaries, who were entitled to any amount recovered to the exclusion of creditors of the estate and all others: American R. R. of Porto Rico *vs.* Birch, 224 U. S. 547. The surviving parents were the actual parties in interest and the administrator was merely an agent through whom suit was brought. Murray administrator, represented the estate; Coronas, as administrator, represented his intestate's living parents, to whom any judgment recovered would be payable to the exclusion of the intestate's estate. In the Murray case, the recovery was estate funds; in the Coronas case, it was not estate funds. The surviving parents suffered this pecuniary loss at the time of death; their right to recover was then complete, and their failure to secure the appointment of an administrator, the agent designated by the Act of Congress to bring the suit in their behalf, for more than two years after they had sustained this loss, barred their right to recover.

In the Murray case, the statute under consideration was purely a statute of limitation, while the Federal Act involved in the Coronas case is more than the ordinary statute of limitation. Under such a statute, the lapse of time not only bars the remedy but destroys the liability.

A. J. Phillips Co. *vs.* Grand Trunk R. R., 236 U. S. 662.

Central Vermont Ry Co. *vs.* White, 238 U. S. 507, 511.

Atlantic Coast Line *vs.* Burnette, 239 U. S. 199.

> "A statute which in itself creates a new liability, gives an action to enforce it unknown to the common law, and fixes the time within which that action may be commenced, is not a statute of limitation. It is a statute of creation, and the com-

> mencement of the action within the time it fixes is an indispensable condition of the liability and of the the action which it permits. Such a statute is an offer of an action on condition that it be commenced within the specified time. If the offer is not accepted, in the only way in which it can be accepted, by a commencement of the action within the specified time, the action and the right of action no longer exist, and the defendant is exempt from liability."

Partee *vs.* St. L. & S. F. R. Co., 204 Fed. 970.

Nearly all of the decisions cited by the Circuit Court of Appeals in the Coronas case are founded upon contract, involved funds due to or by an estate, and follow the doctrine of Murray, Administrator, *vs.* East Indian Co., supra, the earlier cases citing that decision as authority. It is submitted that neither the Murray case, nor any decision following it, should be regarded as a precedent in determining the point of time marking the commencement of the running of the limitation contained in the Federal Employers' Act.

In the Coronas case, the Court, in arriving at the conclusion that the cause of action did not accrue until the appointment of the administrator, lays stress upon the fact that Lord Campbell's Act, upon which the Employers' Liability Act was modeled, expressly provided that the limitation should run from the time of death and that in the enactment of the present law Congress declined to adopt such a limitation and fixed the period from the time the cause of action accrued. It must be remembered, however, that Lord Campbell's Act related only to actions for death, whereas Section 6 of the Act of Congress providing that "no action shall be maintained under this Act unless commenced within two years from the day the cause of action accrued"

> petent and empowered to bring suit. That the cause of action accrued when the employe died from the injuries suffered in the employer's service is not in doubt. The cause of action for damages for the death of the employe, Bixler, was perfected and immediately accrued when he was killed."

A like conclusion was reached by the District Court of the United States for the District of New Jersey in Guinther, Administratrix, *vs.* Philadelphia & Reading Railway Company, not reported. This decision, however, as stated above, was reversed by the Circuit Court of Appeals for the Third Circuit, which decision would now be binding upon the District Court for the Middle District of Pennsylvania, which decided the Bixler case.

In Giersch *vs.* Atchinson, T. & S. F. R. R. Co., 171 Pac. 591 (1918) the Supreme Court of Kansas refused to recognize the doctrine of the Coronas case, which is reviewed in the opinion, the Court, in referring to the Federal Act, saying:

> "It has repeatedly been said to be similar to the Lord Campbell Act and in fixing the limitation at two years it is difficult to conceive that it was intended that all this time and more might elapse before an administrator must be appointed, and that he would then have two years longer in which to sue, which would be the case if the time ran from his appointment and not from the death of the decedent. While, of course, this is a question finally for the Federal Supreme Court, we hold that, in view of the authorities now obtainable, the action must be brought within two years from the time of death, and therefore that the administratrix in this case cannot prevail."

There was in that case a dissenting opinion by two Judges, but the dissent was on the question whether an amendment made more than two years after death did introduce a new cause of action, as decided by the majority of the Court. The dissenting Judges apparently agreed with the conclusion that the statute began to run from time of death.

In Seaboard Air Line *vs.* Brooks, 107 S. E. 878 (1921) the Supreme Court of Georgia likewise refuses to follow the Coronas case, and, after reviewing many authorities, holds that the two year limitation runs from the date of death, and not from the date of the appointment of the administrator. The exact question was certified to the Supreme Court by the Court of Appeals for instructions. After quoting an excerpt from Tiffany on Death by Wrongful Act, the Court say:

> "The author proceeds to show that when the limitation prescribed mentions a certain period, such as 'after the death' or after the injury, no confusion results, but when the period is within a specified time after the cause of action 'accrues' the necessity for construction in connection with the other provisions of the particular statute arises. It is also shown that the recovery by the personal representative is for the benefit of designated relatives, and does not become a part of the estate of the deceased, and such personal representative is a mere nominal party, whose only duty on the receipt of the proceeds of a recovery is to pay the same to the proper beneficiaries. It is generally agreed that where a recovery is sought by a personal representative for the benefit of the 'estate of the deceased person', the cause of action does not accrue until the appointment of an administrator, because until then there is in existence no person capable of suing."

The Court further say (Pages 880 and 881):

"The Coronas case contains an elaborate opinion, which discusses and reviews practically every case presented in the briefs of both parties to the present case, including the Bixler case. Many of the cases cited in the Coronas case deal with ordinary statutes of limitation. If the limitation with which we have to deal were in an ordinary statute applicable to a suit for recovery of a judgment for the benefit of the estate of a deceased, which view we have rejected, it would necessarily follow that it begins to run only with the appointment of an administrator."

* * * * * * * * *

"We conclude from what precedes that the cause of action 'accrues' upon the death of the employe. This seems consonant with the fact that representation of the estate may be had at any time upon the application of the beneficiaries; that the carrier owes no duty to move such appointment."

* * * * * * * * *

"The identical question was involved in the case of Williams *vs.* W. & A. R. Co., 24 Ga. App. 750, 102 S. E. 186, and a petition for certiorari was filed in this court to review the judgment rendered by the Court of Appeals. After careful examination and consideration of the question, this court was then of the opinion that the decision of the Court of Appeals, citing the case of American R. Co. *vs.* Coronas, supra, presented the better view of the question. There were, however, as we have shown above, decisions in which a contrary view was taken. The same question coming again be-

fore the Court of Appeals, that court has certified it to this court; and, on further consideration of the question, we have reached a different conclusion, which we think is sustained by the better reasoning."

Under the authorities last cited, the present action is barred by the statute. When John L. and Malinda D. Koons brought their action under the state law, they averred that they had sustained damage by reason of the death of their son, Lester M. Koons, on April 23, 1915, on which day their cause of action in that proceeding, if any they had, accrued. The same persons, John L. and Malinda D. Koons, are the designated beneficiaries in this proceeding, brought by their agent, John L. Koons, Administrator, under the Federal law, and the judgment on the verdict, entered in the court below, represents the damage sustained by them by reason of the death of their son on April 23, 1915, through the alleged negligent act of defendant. Their loss occurred on that day and their right to damages under the Federal act accrued on that day, provided they could show that the defendant was negligently responsible for the death of their son. It is idle to say that on September 23, 1921, when letters on the estate of Lester M. Koons were issued, more than six years after the commission of the alleged negligent act which resulted in death, a new cause of action against the defendant accrued to John L. Koons, Administrator, to recover for the benefit of himself, in his individual capacity, and his wife, damages which they sustained on the day death occurred. So far as the defendant is concerned, its liability for negligence accrued on the day of the unfortunate accident, which resulted within a few hours thereafter in the death of its employe, at which time the surviving parents, the real parties in interest, sustained their loss. From that date on, it

was within the power of the surviving father, who under the laws of Pennsylvania was entitled to administer the estate of his unmarried son, to take out letters of administration, and institute suit for the benefit of himself and his wife. In his failure to do so for more than two years after the date of death, he was guilty of laches. When suit was instituted, his right to recover as an administrator for the benefit of himself and wife had been lost, and the liability of the defendant had ended. In the first suit brought by John L. and Malinda D. Koons under the state law, while it is true no affidavit of defense was filed for the reason that none was required, the attention of counsel for plaintiffs, before the close of the case in chief, was called to the fact that both the defendant company and the deceased employe had been engaged in interstate commerce at the time of the occurrence of the alleged negligent act, and that, therefore, the Federal Act controlled. Plaintiffs elected, however, to stand on the suit as brought, contending that the deceased had not been engaged in interstate commerce at the time of the happening of the accident. The plaintiffs in that position were not sustained by the trial Court or by the Supreme Court of Pennsylvania, the judgment being that the deceased employe had been engaged in interstate commerce and that, therefore, there could be no recovery in the suit as instituted. It is regrettable that if the surviving parents, real parties in interest, had a good cause of action against this defendant, it has been lost, but the defendant was in no way responsible for this result.

While the amount of the judgment in this case is not great, the principle involved is of the utmost importance to petitioner and other railroad companies. Under Pennsylvania law, there is no limitation as to the time within which letters of administration must be taken out. The survivors of an employe who had

been killed could wait, say fifteen years, twenty years or thirty years before taking out letters, and then have two years thereafter within which to institute suit, if the judgment of the learned Court below is correct. Under the law a common carrier is obliged to preserve its records for only seven years and the bringing of a suit could be deferred until all records had been destroyed, when it would be impossible to determine whether the deceased employe had been engaged in interstate commerce at the time of the accident. The first section of the Act of Congress, as pointed out by the Supreme Court of Georgia in the Brooks case, negatives any such idea. The right of action in case of the death of an employe is given to his or her personal representative for the benefit of the surviving widow or husband and children of such employe, and, if none, then to such employe's parents, and if none, to the next of kin dependent upon such employe. The right is not for the benefit of the estate generally but for persons dependent upon the employe at the time of death, indicating that the action is to be brought promptly after the commission of the negligent act. The cause of action is complete when death results from the negligent act complained of and the designated beneficiaries sustain their loss. The matter of securing the appointment of a personal representative to enforce the cause of action is wholly within the control of the beneficiaries. The common carrier is under no obligation to move, and its right to the defense of the two year limitation, fixed by the Act, should not be swept aside by permitting the beneficiaries to allow more than six years to elapse before raising up a plaintiff to institute a suit to enforce their cause of action.

As the present suit was not brought within two years after the date of death, when the cause of action accrued, there can be no recovery.

> "An action in a state court founded upon the Employers' Liability Act of April 22, 1908, must fail where the record shows that it was not begun until the time had elapsed, after which, under section 6 of that Act, no action shall be maintained."
>
> Atlantic Coast Line *vs.* Burnette, 239 U. S. 199.

It is respectfully submitted that writ of certiorari should be granted as prayed for.

JOHN T. BRADY,

CHARLES HEEBNER,

Counsel for Petitioner.

Supreme Court of the United States

No. 213 October Term, 1925

READING COMPANY, SUCCESSOR OF PHILADELPHIA & READING RAILWAY COMPANY,

Petitioner,

vs.

JOHN L. KOONS,
ADMINISTRATOR OF LESTER M. KOONS.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF PENNSYLVANIA

BRIEF FOR PETITIONER

(30,713)

JOHN T. BRADY,
CHARLES HEEBNER,
Counsel for Petitioner,
No. 18 North Third Street,
Harrisburg, Pa.

(30,713)

Supreme Court of the United States

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INDEX

REPORTS OF OPINIONS IN THE COURTS BELOW

The opinion of the trial Court, Common Pleas of Dauphin County, Pennsylvania, overruling petitioner's motion for judgment of non pros., is reported in John L. Koons, Administrator of Lester M. Koons, *vs.* Philadelphia & Reading Railway Company, 26 Dauphin County Reports 234; the opinion of the Supreme Court of Pennsylvania, affirming the judgment of the Court below, is reported in 281 Pa. 270; 126 Atlantic 381.

GROUNDS ON WHICH JURISDICTION IS INVOKED

Judgment of Court of Common Pleas of Dauphin County affirmed by the Supreme Court of Pennsylvania on October 6, 1924. (R. 19, 20)

The sole question of law involved in this case is as follows:

> In an action against an interstate carrier instituted under the provisions of the Federal Employers' Liability Act by an administrator to recover for the death of an employe of defendant, killed while engaged in interstate commerce, does the two years' limitation fixed by the Act of Congress begin to run from the date of death of such employe or from the date of the appointment of the administrator?

Suit was instituted under the provisions of the Act of Congress of April 22, 1908, c. 149 (35 Stat. 65, U. S. Compiled Stats. 1916, Section 8657) entitled "An Act relating to the liability of common carriers by railroad to their employes in certain cases" more than six years after the death of the employe of the petitioner, but within a few months after the respondent had been appointed administrator of his estate. The claim advanced by the petitioner was that, as the action had not been commenced within two years from the date of death of the employe, it was barred by Section

6 of the said Act of Congress of April 22, 1908, c. 149, as amended by the Act of April 5, 1910, c. 143 (35 Stat. 66, 36 Stat. 291; U. S. Compiled Stats. 1916, Section 8662), which reads as follows:

> "No action shall be maintained under this Act unless commenced within two years from the day the cause of action accrued." (R 18)

The Court below ruled that the cause of action did not accrue until the appointment of a personal representative of the deceased capable of suing, and that the suit was instituted within the statutory period after such appointment. (R. 19, 20.)

The judgment of the Court below denied to the petitioner a right, privilege and immunity under the limitation clause of the said Act of Congress, known as the Federal Employers' Liability Act, which was duly set up and claimed in the trial Court and in the Supreme Court of Pennsylvania, and under Section 237 of the Judicial Code, as amended, Act September 6, 1916, c. 448, 39 Stat. 726 (Compiled Stats. 1916, 1214) and Act February 17, 1922, c. 54, 42 Stat. 366 (Compiled Stats. 1923 Sup. 1214) and the authorities cited, the jurisdiction of this Court was invoked by a petition for writ of certiorari, to the end that the judgment of the Supreme Court of Pennsylvania might be reviewed and determined by this Court: Philadelphia & Reading Coal & Iron Co. *vs.* Gilbert, 245 U. S. 162; Dana *vs.* Dana, 250 U. S. 220.

STATEMENT OF THE CASE

This is an action in trespass instituted in the Court of Common Pleas of Dauphin County, Pennsylvania, on February 6, 1922, by John L. Koons, Administrator of Lester M. Koons, against the Philadelphia & Reading Railway Company to recover for the death of the said Lester M. Koons, who, while in the employ of the said Company at

a place commonly known as Rutherford Yards, Dauphin County, Pennsylvania, on or about the 22nd day of April, 1915, sustained injuries from which he died on the same day or in the early hours of the 23rd of April, 1915. The suit was brought under the provisions of the Act of Congress of April 22, 1908, c. 149 (35 Stat. 65, U. S. Compiled Stats. 1916, Section 8657) entitled, "An Act relating to the liability of common carriers by railroad to their employes in certain cases" for the benefit of the surviving parents, John L. Koons and Malinda D. Koons, the said John L. Koons being the Administrator of the estate. (R. 12). The case involves the construction of Section 6 of the said Act of Congress of April 22, 1908, c. 149, as amended by the Act of April 5, 1910, c. 143 (35 Stat. 66, 36 Stat. 291; U. S. Compiled Stats. 1916, Section 8662), which reads as follows:

> "No action shall be maintained under this Act unless commenced within two years from the day the cause of action accrued."

On April 20, 1916, the said John L. Koons and Malinda D. Koons, as surviving parents of the said Lester M. Koons, brought their action against the Philadelphia & Reading Railway Company in the Court of Common Pleas of Dauphin County, to recover for the death of said Lester M. Koons, the suit being under the statutes in force in the Commonwealth of Pennsylvania. In that action, before the close of plaintiff's case, defendant specifically called attention to the fact that both the Company and the deceased were engaged in interstate commerce at the time Koons met his death, and that therefore the only right of action was under the Federal Employers' Liability Law, which required that the suit be in the name of a personal representative. No motion to amend with respect to the parties plaintiff was made, the plaintiffs electing to stand on the suit as brought, contending that the decedent was not engaged in interstate commerce at the time of the accident. In this proceeding, the trial court on April 3, 1920, entered judgment in favor of the defendant n. o. v. on the ground that decedent had been so engaged in interstate commerce when

injured and that there could be no recovery in a suit instituted by his surviving parents. This judgment was affirmed by the Supreme Court of Pennsylvania on appeal on July 1, 1921, the decision being reported in 271 Pa. 468, 114 Atlantic 262. It was thus definitely determined that any recovery for the death of the said Lester M. Koons could be had only under the provisions of the Federal Act.

Thereafter, on September 23, 1921, the said John L. Koons, the father of decedent, and one of the plaintiffs in the above recited proceedings, took out letters of administration on the estate of his son, and on February 6, 1922, more than six years after the death of the said Lester M. Koons, brought this suit.

The defendant thereupon presented its petition, setting forth all of the pertinent facts and praying that judgment of non pros. be entered for the reason that the action, instituted more than two years after the date of death, was barred by the limitation contained in the Act of Congress, upon which petition a rule was granted upon plaintiff to show cause why the judgment prayed for should not be entered. Plaintiff answered, averring that the action was commenced within two years from the date the cause of action accrued, and praying that the rule be discharged. (R. 2, 3, 4, 5). After argument the Court of Common Pleas discharged the rule absolutely and overruled the motion for judgment of non pros., holding that the limitation contained in the Act of Congress did not begin to run until the appointment of the plaintiff as administrator and that the action was commenced within the statutory period after such appointment. (R. 5).

When the case came on for trial on the merits, plaintiff and defendant stipulated of record that, subject to the legal question involved, under the exception noted, with the right of appeal reserved, a verdict should be taken in favor of the plaintiff and against the defendant in the sum of $2510. (R. 15) Accordingly a verdict was rendered in the amount stated, upon which, on October 23, 1923, judgment was entered, (R. 15), from which an appeal was taken to the Supreme Court of Pennsylvania, which Court on October 6, 1924, affirmed the judgment of the Court of Com-

mon Pleas. (R. 19). On October 25, 1924, the Supreme Court refused a petition for reargument. (R. 23).

After the above recited judgment had been entered against the said Philadelphia & Reading Railway Company, and after an appeal had been taken to the Supreme Court of Pennsylvania, the said Philadelphia & Reading Railway Company was on December 31, 1923, merged with Reading Company, your petitioner, under the final decree of the United States District Court for the Eastern District of Pennsylvania, pursuant to the mandate of your Honorable Court in the case of United States of America *vs.* Reading Company, et al., 253 U. S. 26, and under the merger agreement the said judgment is an obligation of Reading Company.

On the petition of Reading Company, as successor of the Philadelphia & Reading Railway Company, entered to No. 748 October Term, 1924, your Honorable Court on January 5, 1925, granted a writ of certiorari to the Supreme Court of the State of Pennsylvania (R. 25).

SPECIFICATION OF ERROR

The Supreme Court of Pennsylvania erred in overruling the assignment of error (R. 18), that the Court of Common Pleas of Dauphin County, Pennsylvania, erred in overruling the petition for judgment of non pros. for the reason that the action was barred by the two year limitation contained in the Act of Congress, and in discharging the rule to show cause granted thereon, and in affirming the judgment of the said Court of Common Pleas of Dauphin County on the ground that the cause of action did not accrue until the appointment of respondent as administrator of the deceased.

ARGUMENT

The question of law involved in this case is as follows:

> In an action against an interstate carrier, instituted under the provisions of the Federal Employers' Liability Act by an administrator to recover for the death of an employe of defendant, killed while engaged in interstate commerce, does the two years' limitation fixed by the Act of Congress begin to run from the date of death of such employe or from the date of the appointment of the administrator?

The determination of this question requires the construction of Section 6 of the Act of Congress of April 22, 1908, as amended by the Act of April 5, 1910, entitled "An Act relating to the liability of common carriers by railroad to their employes in certain cases" (35 Stat. 66; 36 Stat. 291; U. S. Compiled Statutes 1916, Section 8662), which reads as follows:

> "No action shall be maintained under this Act unless commenced within two years from the day the cause of action accrued."

Under Pennsylvania practice, whether the claim was barred by the limitation clause contained in the Act of Congress was properly raised by the rule to show cause why judgment of non pros. should not be entered because the writ was not issued in time: Prettyman *vs.* Irwin, 273 Pa. 522; 117 Atlantic 195.

Under the Act of Congress an action to recover damages for death must be in the name of a personal representative of the deceased.

American R. R. of Porto Rico *vs.* Birch, 224 U. S. 547,
St. Louis S. F. & T. R. R. *vs.* Seale, 229 U. S. 156.

This suit, brought by the Administrator under the Federal Act, is an entirely different action from the suit of

John L. and Malinda D. Koons, instituted by them as surviving parents under the state law, and cannot in any way be tacked on to that proceeding.

Giersch *vs.* Railroad, 171 Pac. 591, 596.

> "An action by a widow in her individual capacity under the state law is an entirely different action from the one brought by her as Administratrix under the Federal Employers' Liability Act."

Troxel *vs.* D. L. &. W. R. R. 227 U. S. 434.

While the exact question as to when a cause of action for death accrues under the Federal Act has not been passed upon by your Honorable Court, in at least one case it was assumed that the statute began to run from the date of death and not from the time of the issuance of letters on the estate of decedent.

In Roberts on Federal Liability of Carriers, Volume 2, Page 1142, the learned author says:

> "Whether an action under the Federal act must be brought within two years of the date of death of an employe or within two years from the appointment of an administrator, has not been specifically decided by the national Supreme Court; though it seems to have been taken for granted in Missouri K. & T. R. Co. *v.* Wulf that the statute began to run from the time the death occurred."

In the Wulf case referred to, reported in 226 U. S. 570, plaintiff in her individual capacity instituted suit on January 23, 1909, to recover for the death of her son, who was killed on November 27, 1908. On January 4, 1911, or more than two years after date of death, plaintiff took out letters of administration on the estate of her son, and amended her pleadings by changing the party plaintiff from Sallie C. Wulf to Sallie C. Wulf, Administratrix. Under the facts of the case, and in view of the averments contained in the

original petition, the Court held that the amendment was not "equivalent to the commencement of a new action, so as to render it subject to the two years' limitation prescribed by Section 6 of the employers' liability act." Clearly, therefore, this Court in that case assumed that the two year limitation ran from the date of death and not from the time letters were taken out, as the amended petition was filed within a few days after the appointment of the Administratrix. It is noted in the report of the decision that Mr. Justice Lurton "entertains doubts as to whether the two years' limitation does not apply."

In the Wulf case it is to be noted that this Court squarely held that the amendment changing the party plaintiff from Sallie C. Wulf in her individual capacity to Sallie C. Wulf, Administratrix, did not introduce a new cause of action, the amendment merely relating back to the cause of action originally asserted. The cause of action was originally asserted by her as the beneficiary under the Act, and this Court therefore held that in this capacity she had a cause of action at the time the suit was instituted, or in other words, that the cause of action accrued when she suffered the injury, at the date of the death of her son, and not when she was appointed Administratrix. If no cause of action accrued until her appointment as Administratrix, there was no action to which the amendment could relate back. Under this decision, therefore, it is possible for the designated beneficiary to bring suit as an individual at any time after death and thereafter substitute a personal representative of the deceased as party plaintiff without introducing a new cause of action, provided the original pleadings show the case to be within the Federal Act. The bringing of the suit need not be deferred until after the appointment of a personal representative.

This Court, where an amendment of the pleadings has been allowed, has repeatedly cited the Wulf case with approval, holding that if the amendment merely expanded or amplified what was alleged in support of the cause of action already asserted it related back to the commencement of the action and was not affected by the intervening lapse of time: Seaboard Air Line R. R. *vs.* Renn, 241 U. S. 290; New York

Central & Hudson River R. R. *vs.* Kinney, 260 U. S. 340. In this last mentioned case this Court say:

> "In Missouri, K. & T. R. Co. *v.* Wulf, 226 U. S. 570, 57 L. ed. 355, 33 Sup. Ct. Rep. 135, Ann. Cas, 1914B, 134, the declaration was by the mother as sole heir and next of kin of an employee of the plaintiff in error, in terms referring to a statute of Kansas giving her a right of action for injuries resulting in death. An amendment was allowed, more than two years after the injury, in which the plaintiff declared both as sole beneficiary and next of kin and as administratrix, and relied both on the Kansas law and on the act of Congress. The plaintiff got a judgment under the act of Congress, which was sustained by this Court, although the original declaration by the plaintiff could not be attributed to the Employers' Liability Act, because the plaintiff sued only in her personal capacity, and relied for that, as she had to, upon the Kansas law. 226 U. S. 576. It is true that the fact of the injury arising in interstate commerce was pleaded by the defendant. But it was pleaded as a bar to the action as it then stood, and only makes more marked the changes that the amendment introduced. We do not perceive that the effect of the amendment in that case distinguished it from this. It really is a stronger case, because, as we have said, here the declaration was consistent with a wrong under the law of the state or of the United States, as the facts might turn out. The amendment merely expanded or amplified what was alleged in support of the cause of action already asserted . . . and was not affected by the intervening lapse of time."
>
> New York Central & Hudson River R. v. Kinney, 260 U. S. 340, 345.

In the above case, decided in 1922, this Court again assumed that in the Wulf case the cause of action under the

Federal Employers' Liability Act accrued at the time of the death of the employee of the railroad company and not upon the appointment of the administratrix, the Court saying, as above quoted, "the amendment was allowed more than two years after the injury."

The decisions construing Section 6 of the Federal Act, when the question has been squarely raised as to when the cause of action for death accrues, are not uniform.

The leading case, holding that the limitation does not begin to run until the appointment of a personal representative, and the one which the trial court regarded as controlling, is American Railroad of Porto Rico *vs.* Coronas, 230 Fed. 545, decided by the Circuit Court of Appeals for the First Circuit in 1916. In that case, after reviewing numerous authorities, the Court concludes:

> "In view of the well recognized rule heretofore pointed out as to when a right of action accrued—which Congress must have had in mind when enacting the present law—and in view of the fact that Lord Campbell's Act upon which the Employers' Liability Act was modeled, expressly provided that the limitation should run from the death of the injured party, and that in the enactment of the present law Congress declined to adopt such limitation and fixed the period from the time the action accrued, we are of opinion that the proper construction of the statute is that the right of action did not accrue so that the limitation attached, until the administrator was appointed, and that the demurrer was properly overruled."

The "well recognized rule," to which the Court refers, is founded upon the doctrine laid down in an old English case, Murray, Admr. *vs.* East India Company, 5. Barn. & Ald. 204. This was an action by an administrator with the will annexed upon a bill of exchange made payable to the testator, but accepted after his death. The acceptance

of the bill and the date of payment were more than six years before suit was brought, but administration was first taken out less than six years before, and it was held that the statute of limitation began to run from the granting of the letters of administration, and not from the time the bill became due. The Court points out that at the date of acceptance, or the date of payment of the bill, there was no person in existence who could acquire a right of action by the acceptance and non-payment. In reaching its conclusion, the Court said:

> "Now, independently of authority, we think that it cannot be said that a cause of action exists, unless there be also a person in existence capable of suing."

This is the basis of the decision. The debt was due to the estate, and any recovery would be for the benefit of the estate, to be distributed with other assets in accordance with the provisions of the testator's will, but until an administrator c. t. a. was appointed, there was no person capable of suing, no person who could be guilty of laches in not suing.

It is respectfully submitted that the Circuit Court of Appeals in the Coronas case erred in following the doctrine of the Murray case. The Murray case was on contract, based upon a valid consideration. The debt was due to the estate, but until the administrator was appointed there was no person in a position to institute suit and protect the estate. There was no person to whom laches could be imputed. In the Coronas case, the right to recover was based upon proof of negligence of the character described in Section 1 of the Federal Employers' Liability Act, and proof that there were beneficiaries within one of the classes designated by the statute, who had suffered pecuniary loss by reason of the death by wrongful act. The intestate of Coronas at death left his father and mother as surviving statutory beneficiaries, who were entitled to any amount recovered to the exclusion of creditors of the estate and all others: American R. R. of Porto Rico *vs.* Birch, 224 U. S. 547. The sur-

viving parents were the actual parties in interest and the administrator was merely an agent through whom suit was brought. Murray administrator, represented the estate; Coronas, as administrator, represented his intestate's living parents, to whom any judgment recovered would be payable to the exclusion of the intestate's estate. In the Murray case, the recovery was estate funds; in the Coronas case, it was not estate funds. The surviving parents suffered this pecuniary loss at the time of death; their right to recover was then complete, and their failure to secure the appointment of an administrator, the agent designated by the Act of Congress to bring the suit in their behalf, for more than two years after they had sustained this loss, barred their right to recover.

In the Murray case, the statute under consideration was purely a statute of limitation, while the Federal Act involved in the Coronas case is more than the ordinary statute of limitation. Under such a statute, the lapse of time not only bars the remedy but destroys the liability.

A. J. Phillips Co. *vs.* Grand Trunk R. R. 236 U. S. 662.
Central Vermont Ry. Co. *vs.* White, 238 U. S. 507, 511.
Atlantic Coast Line *vs.* Burnette, 239 U. S. 199.

> "A statute which in itself creates a new liability, gives an action to enforce it unknown to the common law, and fixes the time within which that action may be commenced, is not a statute of limitation. It is a statute of creation, and the commencement of the action within the time it fixes is an indispensable condition of the liability and of the the action which it permits. Such a statute is an offer of an action on condition that it be commenced within the specified time. If the offer is not accepted, in the only way in which it can be accepted, by a commencement of the action within the specified time, the action and the right of action no longer exist, and the defendant is exempt from liability."

Partee *vs.* St. L & S. F. R. Co. 204 Fed. 970.

The distinction between the ordinary statute of limitation and the limitation clause contained in the Federal Employer's Liability Act is clearly recognized by this Court in the late case of William Danzer & Co. *vs.* Gulf & Ship Island R. R. Co., decided June 8, 1925, wherein this Court say:

> "We need not re-examine the doctrine of Campbell *v.* Holt, 115 U. S. 620, 20 L. ed. 483, 6 Sup. Ct. Rep. 209, as it is plain that case does not apply. That was an action on a contract for the recovery of money. By a state statute of limitations, the right of action had been barred. The statute was repealed before the action was commenced. It was held that the action could be maintained, and that such repeal did not deprive the debtor of his property without due process of law, in violation of the 14th Amendment. The decision rests on the conception that the obligation of the debtor to pay was not destroyed by lapse of time, and that the Statute of Limitations related to the remedy only, and that the removal of the bar was not unconstitutional. The opinion distinguishes the case from suits to recover real and personal property. That case belonged to the class where statutory provisions fixing the time within which suits must be brought to enforce an existing cause of action are held to apply to the remedy only. But such provisions sometimes constitute a part of the definition of a cause of action created by the same or another provision, and operate as a limitation upon liability. Such, for example, are statutory causes of action for death by wrongful act (The Harrisburg, 119 U. S. 199, 214, 30 L. ed. 358, 362, 7 Sup. Ct. Rep. 140) and **those arising under the Federal Employers' Liability Act* (April 22, 1908, chap. 149, 35 Stat. at L. 65, Comp. Stat. Sec. 8657, 8 Fed. Stat. Anno. 2d ed. p. 1208; Central Vermont R. Co. *v.* White, 238 U. S. 507, 511, 59 L. ed. 1433,

Italics ours.

1436, 35 Sup. Ct. Rep. 865, Ann. Cas 1916B, 252, 9 N. C. C. A. 265; Atlantic Coast Line R. Co. *v.* Burnette, 239 U. S. 199, 201, 60 L. ed. 226, 227, 36 Sup. Ct. Rep. 75, 17 N. C. C. A. 144; Kannellos *v.* Great Northern R. Co. 151 Minn. 157, 160, 186 N. W. 389; Jones *v.* Delaware L. & W. R. Co. 96 N. J. L. 197, 114, Atl. 331. See also Davis *v.* Mills, 194 U. S. 451, 452, 48 L. ed. 1067, 1070, 24 Sup. Ct. Rep. 692. This case belongs to the latter class."

William Danzer & Co. *vs.* Gulf & Ship Island R. R. Co. —U. S.—, 69 L. ed. 720, 721.

Nearly all of the decisions cited by the Circuit Court of Appeals in the Coronas case are founded upon contract, involved funds due to or by an estate, and follow the doctrine of Murray, Administrator, *vs.* East India Co., supra, the earlier cases citing that decision as authority. It is submitted that neither the Murray case, nor any decision following it, should be regarded as a precedent in determining the point of time marking the commencement of the running of the limitation contained in the Federal Employers' Act.

In the Coronas case, the Court, in arriving at the conclusion that the cause of action did not accrue until the appointment of the administrator, lays stress upon the fact that Lord Campbell's Act, upon which the Employers' Liability Act was modeled, expressly provided that the limitation should run from the time of death and that in the enactment of the present law Congress declined to adopt such a limitation and fixed the period from the time the cause of action accrued. It must be remembered, however, that Lord Campbell's Act related only to actions for death, whereas Section 6 of the Act of Congress providing that "no action shall be maintained under this Act unless commenced within two years from the day the cause of action accrued" relates not only to an action for damages for death, but also to an action by an injured employe in his own right. It is apparent, therefore, that the departure

from the language used in the Lord Campbell Act was made to cover both causes of action.

With all due respect to the Circuit Court of Appeals for the First Circuit, it is submitted that it pronounced an erroneous judgment in the Coronas case, and the later decisions which adopted it as a precedent, in construing the Federal Act, should have but little weight.

In Bird *vs.* Ft. Worth & R. G. Ry., 207 S. W. 518, the Supreme Court of Texas, in 1918, without the citation of any other authorities, and without discussion, followed the Coronas case.

In 1921, the U. S. District Court for the Western District of New York, in Kierejewski *vs.* Great Lakes Dredge & Dock Co., 280 Fed. 125, reached the same conclusion, basing its decision wholly upon the Coronas case, and in reviewing that decision, and following its fallacious reasoning, expressly states that it is based upon the view that the right of action by the personal representative does not spring from the act of negligence by which the employe was killed, but arises from the pecuniary loss and damages sustained by the beneficiaries in consequence of death. It is submitted that the language of Section 1 of the Act of Congress does not bear out this view. The common carrier engaged in interstate commerce is made "liable in damages" in case of death to the personal representative for the benefit of the designated beneficiaries, but the right of action is "for such death, resulting in whole or in part from the negligence of any of the officers, agents, or employes of such carrier, or by reason of any defect or insufficiency due to its negligence in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment."

In a recent opinion, the Circuit Court of Appeals for the Third Circuit in Guinther, Administratrix, *vs.* Philadelphia & Reading Railway Company, 1 Fed. (2d) 85, reversing the District Court of the United States for the District of New Jersey, also held that the cause of action did not accrue and the statute did not begin to run until the appointment of the administratrix. In reaching this

conclusion, the Court, without discussion, merely followed the rule laid down in the Murray and the Coronas cases, citing those decisions among others, as authority.

In the present case the Supreme Court of Pennsylvania do not touch upon the position taken by the Railway Company that a different rule should prevail where the action is not for the benefit of the estate generally, but is instituted by the administrator merely as agent for designated beneficiaries, as was held by the Supreme Court of Georgia in Seaboard Air Line *vs.* Brooks infra. After referring to the Coronas and Guinther cases, decided by the Federal appellate courts, the Court say: "As the question raised here is identical with that passed upon in the two cases referred to and requires interpretation of a Federal statute, we will follow the construction placed upon the limitation clause by the two Federal Courts above mentioned and affirm the judgment of the Court below."

Where the question here involved was squarely raised, there appear to be four decisions holding the contrary view, that the cause of action accrues upon the death of the employe.

In 1913 the U. S. District Court for the Middle District of Pennsylvania, in Bixler *vs.* Pa. R. R. Co., 201 Fed. 553, said:

> "Some argument was indulged regarding the exact time when the cause of action accrued, whether when the employe was injured and died, or when proper parties appeared who were competent and empowered to bring suit. That the cause of action accrued when the employe died from the injuries suffered in the employer's service is not in doubt. The cause of action for damages for the death of the employe, Bixler, was perfected and immediately accrued when he was killed."

A like conclusion was reached by the District Court of the United States for the District of New Jersey in Guinther, Administratrix, *vs.* Philadelphia & Reading Railway

Company, not reported. This decision however, as stated above, was reversed by the Circuit Court of Appeals for the Third Circuit, which decision would now be binding upon the District Court for the Middle District of Pennsylvania, which decided the Bixler case.

In Giersch *vs.* Atchinson, T. & S. F. R. R. Co., 171 Pac. 591 (1918) the Supreme Court of Kansas refused to recognize the doctrine of the Coronas case, which is reviewed in the opinion, the Court, in referring to the Federal Act, saying:

> "It has repeatedly been said to be similar to the Lord Campbell Act and in fixing the limitation at two years it is difficult to conceive that it was intended that all this time and more might elapse before an administrator must be appointed, and that he would then have two years longer in which to sue, which would be the case if the time ran from his appointment and not from the death of the decedent. While, of course, this is a question finally for the Federal Supreme Court, we hold that, in view of the authorities now obtainable, the action must be brought within two years from the time of death, and therefore that the administratrix in this case cannot prevail."

There was in that case a dissenting opinion by two Judges, but the dissent was on the question whether an amendment made more than two years after death did introduce a new cause of action, as decided by the majority of the Court. The dissenting Judges apparently agreed with the conclusion that the statute began to run from time of death.

In Seaboard Air Line *vs.* Brooks, 107 S. E. 878 (1921) the Supreme Court of Georgia likewise refuses to follow the Coronas case, and, after reviewing many authorities, holds that the two year limitation runs from the date of death, and not from the date of the appointment of the administrator. The exact question was certified to the Supreme Court by the Court of Appeals for instructions.

After quoting an excerpt from Tiffany on Death by Wrongful Act, the Court say:

> "The author proceeds to show that when the limitation prescribed mentions a certain period, such as 'after the death' or after the injury, no confusion results, but when the period is within a specified time after the cause of action 'accrues' the necessity for construction in connection with the other provisions of the particular statute arises. It is also shown that the recovery by the personal representative is for the benefit of designated relatives, and does not become a part of the estate of the deceased, and such personal representative is a mere nominal party, whose only duty on the receipt of the proceeds of a recovery is to pay the same to the proper beneficiaries. It is generally agreed that where a recovery is sought by a personal representative for the benefit of the 'estate of the deceased person,' the cause of action does not accrue until the appointment of an administrator, because until then there is in existence no person capable of suing."

The Court further say (Pages 880 and 881):

> "The Coronas case contains an elaborate opinion, which discusses and reviews practically every case presented in the briefs of both parties to the present case, including the Bixler case. Many of the cases cited in the Coronas case deal with ordinary statutes of limitation. If the limitation with which we have to deal were in an ordinary statute applicable to a suit for recovery of a judgment for the benefit of the estate of a deceased, which view we have rejected, it would necessarily follow that it begins to run only with the appointment of an administrator."
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> * * * * * * * * * * * * *
>
> "We conclude from what precedes that the cause of action 'accrues' upon the death of the

employe. This seems consonant with the fact that representation of the estate may be had at any time upon the application of the beneficiaries; that the carrier owes no duty to move such appointment."

* * * * * * * * * * * * *

"The identical question was involved in the case of Williams *vs.* W. & A. R. Co., 24 Ga. App. 750, 102 S. E. 186, and a petition for certiorari was filed in this court to review the judgment rendered by the Court of Appeals. After careful examination and consideration of the question, this court was then of the opinion that the decision of the Court of Appeals, citing the case of American R. Co. *vs.* Coronas, supra, presented the better view of the question. There were, however, as we have shown above, decisions in which a contrary view was taken. The same question coming again before the Court of Appeals, that court has certified it to this court; and, on further consideration of the question, we have reached a different conclusion, which we think is sustained by the better reasoning."

Seaboard Air Line *vs.* Brooks, 107 S. E. 878.

Under the authorities last cited, the present action is barred by the statute. When John L. and Malinda D. Koons brought their action under the state law, they averred that they had sustained damage by reason of the death of their son, Lester M. Koons, on April 23, 1915, on which day their cause of action in that proceeding, if any they had, accrued. The same persons, John L. and Malinda D. Koons, are the designated beneficiaries in this proceeding, brought by their agent, John L. Koons, Administrator, under the Federal law, and the judgment on the verdict, entered in the court below, represents the damage sustained by them by reason of the death of their son on April 23, 1915, through the alleged negligent act of defendant. Their loss occurred on that day and their right to damages under

the Federal act accrued on that day, provided they could show that the defendant was negligently responsible for the death of their son. It is idle to say that on September 23, 1921, when letters on the estate of Lester M. Koons were issued, more than six years after the commission of the alleged negligent act which resulted in death, a new cause of action against the defendant accrued to John L. Koons, Administrator, to recover for the benefit of himself, in his individual capacity, and his wife, damages which they sustained on the day death occurred. So far as the defendant is concerned, its liability for negligence accrued on the day of the unfortunate accident, which resulted within a few hours thereafter in the death of its employe, at which time the surviving parents, the real parties in interest, sustained their loss. From that date on, it was within the power of the surviving father, who under the laws of Pennsylvania was entitled to administer the estate of his unmarried son, to take out letters of administration, and institute suit for the benefit of himself and his wife. In his failure to do so for more than two years after the date of death, he was guilty of laches. When suit was instituted, his right to recover as an administrator for the benefit of himself and wife had been lost, and the liability of the defendant had ended. In the first suit brought by John L. and Malinda D. Koons under the state law, while it is true no affidavit of defense was filed for the reason that none was required, the attention of counsel for plaintiffs, before the close of the case in chief, was called to the fact that both the defendant company and the deceased employe had been engaged in interstate commerce at the time of the occurrence of the alleged negligent act, and that, therefore, the Federal Act controlled. Plaintiffs elected, however, to stand on the suit as brought, contending that the deceased had not been engaged in interstate commerce at the time of the happening of the accident. The plaintiffs in that position were not sustained by the trial Court or by the Supreme Court of Pennsylvania, the judgment being that the deceased employe had been engaged in interstate commerce and that, therefore, there could be no recovery in the suit as insti-

tuted. It is regrettable that if the surviving parents, real parties in interest, had a good cause of action against this defendant, it has been lost, but the defendant was in no way responsible for this result.

While the amount of the judgment in this case is not great, the principle involved is of the utmost importance to petitioner and other railroad companies. Under Pennsylvania law, there is no limitation as to the time within which letters of administration must be taken out. The survivors of an employe who had been killed could wait, say fifteen years, twenty years or thirty years before taking out letters, and then have two years thereafter within which to institute suit, if the judgment of the learned Court below is correct. Under the law a common carrier is obliged to preserve its records for only seven years and the bringing of a suit could be deferred until all records had been destroyed, when it would be impossible to determine whether the deceased employe had been engaged in interstate commerce at the time of the accident. The first section of the Act of Congress, as pointed out by the Supreme Court of Georgia in the Brooks case, negatives any such idea. The right of action in case of the death of an employe is given to his or her personal representative for the benefit of the surviving widow or husband and children of such employe, and, if none, then to such employe's parents, and if none, to the next of kin dependent upon such employe. The right is not for the benefit of the estate generally but for persons dependent upon the employe at the time of death, indicating that the action is to be brought promptly after the commission of the negligent act. The cause of action is complete when death results from the negligent act complained of and the designated beneficiaries sustain their loss. The matter of securing the appointment of a personal representative to enforce the cause of action is wholly within the control of the beneficiaries. The common carrier is under no obligation to move, and its right to the defense of the two year limitation, fixed by the Act, should not be swept aside by permitting the beneficiaries to allow more than six years to elapse before raising

up a plaintiff to institute a suit to enforce their cause of action.

As the present suit was not brought within two years after the date of death, when the cause of action accrued, there can be no recovery.

> "An action in a state court founded upon the Employers' Liability Act of April 22, 1908, must fail where the record shows that it was not begun until the time had elapsed, after which, under section 6 of that Act, no action shall be maintained."
> Atlantic Coast Line *vs.* Burnette, 239 U. S. 199.

Respectfully submitted,

JOHN T. BRADY,
CHARLES HEEBNER,
Counsel for Petitioner.

Supreme Court of the United States

No. 213 October Term, 1925.

READING COMPANY, SUCCESSOR OF PHILADELPHIA & READING RAILWAY COMPANY,

Petitioner,

vs.

JOHN L. KOONS,
ADMINISTRATOR OF LESTER M. KOONS.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF PENNSYLVANIA

BRIEF FOR RESPONDENT
(30.713)

Geo Ross Hull.
PAUL G. SMITH,
JOHN R. GEYER,
Counsel for Respondent.

802 Mechanics Trust Bldg.
Harrisburg, Pa.

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REPORT OF OPINIONS IN THE COURTS BELOW

The opinion of the trial Court, Common Pleas of Dauphin County, Pennsylvania overruling petitioner's motion for judgment of non pros., is reported in John L. Koons, Administrator of Lester M. Koons, vs. Philadelphia & Reading Railway Company, 26 Dauphin County Reports 234; the opinion of the Supreme Court of Pennsylvania, affirming the judgment of the Court below, is reported in 281 Pa. 270; 126 Atlantic 381.

The opinion of the trial Court, Common Pleas of Dauphin County, Pennsylvania, in the suit brought in 1916 by the surviving parents in their own right, sustaining defendant's motion for judgment n. o. v., is reported in 23 Dauphin County Reports 91; the opinion of the Supreme Court of Pennsylvania, affirming the action of the Court below in entering judgment n. o. v., is found in 271 Pa. 468; 114 Atlantic 262.

STATEMENT OF THE CASE

This is an action in trespass brought February 6, 1922, in the Court of Common Pleas of Dauphin County, Pennsylvania, to No. 222 January Term, 1922, against the Philadelphia & Reading Railway Company, by John L. Koons, administrator of Lester M. Koons, deceased, for the benefit of the surviving parents under the Federal Employers' Liability Act.

The single question involved is the construction of Section 6 of the Act of Congress of April 22, 1908 c. 149, as amended by the Act of April 5, 1910 c. 143 (35 Stat. 66; 36 Stat. 291; U. S. Compiled Stat. 1916, Section 8662), which reads as follows:

> "No action shall be maintained under this Act unless commenced within two years from the day the cause of action accrued".

On April 22, 1915, Lester M. Koons, while in the employ of the defendant and engaged in unloading parts of a wrecked freight car shipped from Gettysburg, Adams County, Pennsylvania, to Rutherford Yards, Dauphin County, Pennsylvania, sustained injuries from which he died the next day.

Thereafter on April 20, 1916, John L. Koons and Malinda Koons, the surviving parents of Lester M. Koons, brought an action of trespass against the Philadelphia & Reading Railway Company in the Court of Common Pleas of Dauphin County, Pennsylvania, and entered to No. 410 June Term, 1916, to recover damages for his death. This action was instituted under the statute in force in the State of Pennsylvania. The plantiffs filed their statement of claim on September 19, 1916. This statement did not aver any cause of action or plead any facts within the Federal Employers' Liability Act. To this statement no affidavit of defense was filed. (R. 5-6)

Because of the congested state of the trial list and of serious illness of plaintiff's counsel, the cause was not brought to trial until May, 1917. Then, for the first time

the plaintiffs were advised, through the defense interposed by the defendant, of its contention that the deceased met his death while engaged in employment relating to interstate commerce (R. 4).

At this time the plaintiffs were precluded from moving to amend with respect to the parties plaintiff so as to bring the action within the Federal Employers' Liability Act, as such an amendment, under the state of the pleadings, would have introduced a new cause of action.

The jury found as a fact that the deceased had not been working about an instrumetality engaged in interstate commerce at the time of his injury, and on May 19, 1917, returned a verdict in favor of the plaintiffs. The defendant immediately filed a motion for judgment n. o. v., which motion was argued in October, 1917, but no decision handed down by the trial court until April 3, 1920, when the defendant's motion was sustained in an opinion reported in 23 Dauphin County Reports 91. Thereupon, on September 29, 1920, the defendant had judgment entered in its favor, from which action the plaintiffs on September 30, 1920, appealed to the Supreme Court of Pennsylvania. On July 1, 1921, the Supreme Court of Pennsylvania affirmed the action of the court below in directing the entry of judgment n. o. v. for the defendant (R. 6), in an opinion reported in 271 Pa. 468; 114 Atlantic 262.

Thereupon letters of administration on the estate of Lester M. Koons were, on the 23d day of September, 1921, duly granted to John L. Koons, plaintiff herein. Prior to this time no letters in said estate had been granted to anyone. On February 6, 1922, the plaintiff, as administrator of said estate, brought the action, now under review, for the benefit of the surviving parents, John L. Koons and Malinda Koons, under the Federal Employers' Liability Act of April 22, 1908, as amended by the Act of April 5, 1910 (U. S. Compiled Statutes, 1916, Sec. 8662). Plaintiff's statement was filed the same day. (R. 6).

Approximately a year later, on April 2, 1923, the defendant presented its petition praying for judgment of non pros, averring therein that the instant action accrued to the plaintiff at the time of the death of Lester M. Koons

and, a period of more than two years having elapsed between the date of the death and the bringing of the suit, the right to maintain the action was lost, under Section 6 of the Act heretofore referred to. (R. 6).

Plaintiff in answering this rule averred that the action was commenced within two years from the date of the appointment of the administrator, and prayed that the rule be discharged (R. 2,3,4,5). After argument, the Court of Common Pleas discharged the defendant's rule and refused its motion for judgment of non pros., holding that the limitation contained in the Act of Congress did not begin to run until the appointment of the plaintiff as administrator, and that the action was commenced within the statutory period after such appointment (R. 5).

When the case came to trial on the merits, plaintiff and defendant stipulated of record that, subject to the legal question involved, under the exception noted, with the right of appeal reserved, a verdict should be taken in favor of the plaintiff and against the defendant in the sum of $2,510. (R. 15). Accordingly a verdict was rendered in the amount stated, upon which, on October 23, 1923, judgment was entered (R. 15). From this judgment an appeal was taken to the Supreme Court of Pennsylvania, which Court on October 6, 1924, (reported in 281 Pa. 270; 126 Atlantic 381), affirmed the judgment of the Court of Common Pleas. (R. 19). On October 25, 1924, the Supreme Court of Pennsylvania refused a petition for reargument. (R. 23).

On the petition of Reading Company, as successor of the Philadelphia & Reading Railway Company, entered to No. 748 October Term, 1924, your Honorable Court on January 5, 1925, granted a writ of certiorari to the Supreme Court of the State of Pennsylvania (R. 25).

ARGUMENT

The present action was begun over two years after the death of the defendant's employee but within two years of the appointment of the plaintiff as administrator of his estate.

A single question alone is involved. When did the cause of action accrue under Section 6 of the Federal Employers' Liability Act of April 22, 1908, as amended by the Act of April 5, 1910 (U. S. Compiled Statutes, 1916, Sec. 8662), which reads as follows:

> "No action shall be maintained under this Act unless commenced within two years from the day the cause of action accrued".

Did the two year limitation run from the date of death of the employee or from the date of the appointment of the plaintiff as administrator by his estate?

The Common Pleas Court of Dauphin County held that the two year limitation did not begin to run until the appointment of the plaintiff as administrator (R. 5). The Supreme Court of Pennsylvania, in affirming the trial court, followed the construction placed upon the limitation clause in question by the Circuit Court of Appeals for the Third Circuit, in *Guinther, Administratrix* vs. *Philadelphia & Reading Railway Company, 1 Fed. (second series) 85 (1924)*, and by the Circuit Court of Appeals for the First Circuit in *American Railroad of Porto Rico* vs. *Coronas, 230 Fed. 545, (1916)*. These two cases, the respondent respectfully submits, are well considered, directly in point and therefore conclusive of the question here raised.

The principle of these two cases was also followed by the Supreme Court of Texas in *Bird* vs. *Ft. Worth & R. G. Ry Co., 207 S. W. 518 (1918)*, and by the United States District Court for the Western District of New York in *Kierejewski* vs. *Great Lakes Dredge & Dock Company, 280 Fed. 125 (1921)*.

In the *Guinther case, supra.*, the plaintiff, administratrix of the estate of William Guinther, her deceased husband,

brought suit under the Federal Employers' Liability Act to recover damages for his death occurring August 1, 1916, while in the employ of the defendant railroad company. The plaintiff was not appointed administratrix until September 21, 1922. Suit was instituted in the United States District Court for the District of New Jersey on October 7, 1922—over six years after the death. The defendant's motion, made in the District Court for judgment under the pleadings, was granted. On writ of error to the Circuit Court of Appeals, Third Circuit, this judgment was reversed with directions to restate the complaint and proceed according to law.

In the *Coronas case, supra.*, Pedro Didricksen died intestate December 8, 1908, from injuries sustained November 30, 1908, while employed by the defendant in switching and coupling cars on its railroad. Letters of administration were granted to the plaintiff on May 12, 1914. The action was brought by the administrator under the Federal Employers' Liability Act, December 17, 1914—over six years after the date of the death, but shortly after the appointment of the administrator. The defendant filed a demurrer to the declaration, setting forth that the action was barred under Section 6 of the Act. This demurrer was over-ruled and there was a verdict for the plaintiff. On appeal to the Circuit Court of Appeals for First Circuit, the judgment was affirmed by Bingham, Circuit Judge, in an elaborate opinion exhaustively reviewing the authorities.

As this opinion concisely sets out the legal principles here controlling and the many authorities supporting the same, we extensively quote from it page 547, et seq.:

AMERICAN RAILROAD COMPANY OF PORTO RICO VS. CORONAS—OPINION IN PART.

"It is to be noted that the statute does not require that the action shall be brought within two years from the death, but within two years from the time the cause of action accrued. It is also to be noted that the action is not for the occurrence out of which the death arose, but

for the pecuniary damage to the beneficiary due to the death; so that, in no event, could the cause of action arise until after the death, or be said to exist so that the statute could run until after that time. We may therefore assume that the statute, so far as this cause of action is concerned, did not begin to run until after death had ensued.

"It is a general rule of law that where a cause of action arises as in this case, after death, it is considered as accruing, for the purpose of the running of the statute, only from the time when there is some one in existence capable of suing, and if no one but the administrator can sue, that the statute does not begin to run until administration is granted. This principle was announced at an early day. The leading English case on the subject is Murray, Administrator *v.* East India Co., 5 Barn. & Ald. 204, which has been very generally followed in this country. It was an action by an administrator, with the will annexed upon a bill of exchange made payable to the testator, but accepted after his death. The acceptance of the bill and the day of payment were more than six years before suit was brought, but administration was first taken out less than six years before, and it was held that the statute of limitation began to run from the granting of the letters of administration, and not from the time the bill became due, as the cause of action did not accrue until there was a party capable of suing.

"In Sanford *v.* Sanford, 62 N. Y. 553, 554, the court says:

> " 'The term 'cause of action' includes, not only the right proper, but the existence of a person by or against whom process can issue. A cause of action cannot accrue or exist unless there is a person in esse against whom an action can be brought and the right of action enforced. It is well said that 'when there is no person to sue there can be no laches.' A case literally within the words of the statute is without its spirit when it is impossible to maintain a suit at law. Richards *v.* Maryland Ins. Co., 8 Cranch, 84 (3 L. Ed. 496). It is directly adjudged that the statute does not commence to run against the representatives

> of a deceased creditor upon an obligation incurred, or debt becoming due after his decease, until administration is granted upon his estate, there being no cause of action until there is a party capable of suing. Murray *v.* East India Co., 5 Barn. & Ald. 204; Bucklin *v.* Ford, 5 Barb. (N. Y.) 393; Cary *v.* Stephenson, 2 Salk. 421. In order to put the statute in motion there must not only be a person in esse to sue, but a person to be sued. Davis *v.* Garr, 6 N. Y. 124 (55 Am., Dec. 387); Levering *v.* Rittenhouse, 4 Whart. (Pa.) 130, per Nelson, J., Wenman *v.* Mohawk Ins. Co., 13 Wend. (N. Y.) 267 (28 Am. Dec. 464); Jolliffe *v.* Pitt, 2 Vern, 694; Douglas *v.* Forrest, 4 Bing. 686; Benjamin *v.* De Groot, 1 Denio (N. Y.) 155.'

"In Collier *v.* Goessling, 160 Fed. 604, 611, 87 C. C. A. 506, Judge Lurton, speaking for the Circuit Court of Appeals for the Sixth Circuit, said:

> "'To start the running of a statute of limitation there must be some one capable of suing, some one subject to be sued, and a tribunal open for such suits.'

"In Fulenweider's Case, 9 Ct. Cl. (U. S.) 403, it was sought to defeat a contract claim against the government on the ground that it was barred by the statute. The Act of Congress of March 3, 1863 (12 Stat. 765, c. 92 (Comp. St. 1913 sec. 1147), provided:

> "'That every claim against the United States, if cognizable by the Court of Claims, shall be forever barred unless the petition setting forth a statement of the claim be filed in the court or transmitted to it under the provisions of this act within six years after the claim first accrues.'

"It seems that the contractor died before the claim accrued, the services rendered having been completed June 1, 1861. The petition was not filed until March 13, 1873, but administration was granted December 19, 1870, and it was held:

"' It is a well-settled rule that if, when the right of action would otherwise accrue and the statute (of limitations) begin to run, there is no person in existance who is qualified to sue upon that right, the statute does not begin to run till there is such a person. Angell on Lim. Secs. 54-63. For this claim none but a personal representative * * * could sue; and there was no personal representative until December 19, 1870, when the statute began to run, less than three years before this suit was brought.'

* * * * * * * * * * * * * * *

"In Andrews *v.* Hartford & New Haven R. R. Co., 34 onn. 57, the question was, for all practical purposes, iden-cal with one here presented. The Connecticut statute rovided in substance that, where a life was lost by reason the negligence of a railroad company, such company ould be liable to pay damages not exceeding $5,000 nor ss than $1,000, to the use of the executor or adminis-ıtor, to be recovered by him in an action for the benefit the husband or widow or children or heirs of the de-ased person, as the case might be, and the court, on ge 59, said:

"'The cause of action here would have been perfect on the happening of the death, and under section 546 would have been barred at the end of one year from the happening of that event, if an ordinary case, or there had been an executor. But it is a rule of law reognized by the court in Hobart *v.* Connecticut Turnpike Co., 15 Conn. 145, that a cause of action, accruing to an administrator after the death of the intestate, is not complete, and does not arise and exist, so that the statute of limitations can begin to run upon it, until an administrator is appointed who can bring suit. And the Legislature seem to have had that rule in view when they enacted the statute: for they did not say that the action should be barred unless commenced within one year from the death, or the happening of the events for which it is given, but unless 'commenced within one year after the cause of action shall have arisen.' Inasmuch then, as under a well-

> settled rule no cause of action can arise and exist in favor of an administrator until he comes into existence as such and this suit was brought within one year after the plaintiff received his appointment, it was not barred, and the court below erred in sustaining the demurrer.'

"In Sherman *v.* Western State Co. 24 Iowa, 515, the action was brought by an administrator under the Iowa statute, charging that his intestate's death was occasioned by the negligence of the defendant. In this case all the judges were agreed that, if the statute gave a new cause of action for the death, the right of action would not accrue and the statute of limitations would not attach until an administrator was appointed. The members of the Court, however, where not agreed as to whether the statute gave a new cause of action for the death, but the majority was of the opinion that, whether the statute gave a new cause of action for the death or not, inasmuch as the death was substantially instantaneous, a right of action did not accrue to the plaintiff's intestate in his lifetime, and, this being so, the statute of limitation did not attach and begin to run until an administrator was appointed.

"In the Circuit Court of the United States for the Southern District of Iowa, Judge Shiras, in Ewell, Administratrix, *v.* Chicago & N. W. Ry. Co. 29 Fed. 57, reviews the decision in Sherman *v.* Western Stage Co., supra, and, among other things, says:

> " 'If, however, the statute is to be construed to create, in favor of the estate, a cause of action other and distinct from that accruing to the person injured, then the question to be determined is: When does the statute begin to run as against such an action? The usual rule is that the statute begins to run when the right of action accrues; and, unless otherwise provided in the statute, the right of action is not deemed to have accrued until there is a person authorized to prosecute the same.'

"In Kennedy *v.* Burrier, 36 Mo. 128, 130, the Missouri statute (R. C. 1855 p. 648, sec. 2), which the court had

under consideration, did not give a right of action to the personal representative for the wrongful killing of another, but provided that the suit should be brought (1) by the husband or wife of the deceased or (2) is there be no husband or wife, or he or she fail to sue within six months, then by the minor child or children of the deceased; and it was further provided (section 6) that "every action instituted by virtue of the preceding sections of this act shall be commenced within one year after the cause of action accrued." The widow failed to bring suit within six months after her husband's death, and the plaintiff, a minor child, brought suit within a year after the six months had elapsed within which the widow could have sued, but more than a year after the death. And the court held that, inasmuch as the widow could have brought suit immediately following the death of her husband, the cause of action accrued and the statute began to run at and from that date. In discussing the question the court said:

> " 'When, then, did the cause of action accrue? We think the cause of action accrued whenever the defendant's liability became perfect and complete. Whenever the defendant had done an act which made him liable in damages, and there was a person in esse to whom the damages ought to be paid, and who might sue for and recover the same, then clearly the cause of action had accrued as against him. When, then, did the liability take place? Evidently at the death of Kennedy. The defendant at that time had done the whole wrong complained of, and there was a person in esse—to wit, Kennedy's widow—entitled to receive and empowered to sue for damages. Then the cause of action clearly accrued at the death of Kennedy, and the statute commenced running from that time.'

"In Crapo, Administratrix, *v.* City of Syracuse, 183 N. Y. 395, 76 N. E. 465, the Code of New York provided for an action by an executor or administrator to recover damages for a wrongful act or neglect resulting in death, and required that the action, when brought against a city having a population of 50,000 or more should be "commenced within

one year after the cause of action therefore shall have accrued," and that "notice of intention to commence such action and of the time and place at which the injuries were received" should be "filed with the counsel to the corporation, or other proper law officers thereof within six months after such cause of action shall have accrued." The notice was filed 18 months after the death and within less than 2 months of the appointment of the administratrix. Action was commenced within 20 months after death and within 5 months after the appointment. If the action accrued at the death, and not when administration was granted, the notice was not seasonably given and the action was not seasonably commenced. O'Brien, J., discussing the question said:

> " 'The notice which the statute requires to be served within 6 months after the cause of action has accrued must contain a statement that the party giving notice intends to commence an action. The absence of such a statement vitiates the notice. Curry *v.* City of Buffalo 57 Hun. 25 (10 N. Y. Supp. 392). Who is to give the notice? It is very obvious that inasmuch as no one can bring such an action except a personal representative of the decedent the notice must come from him, and of course he cannot give any such notice until his appointment. A notice served by a stranger, or any one else except a personal representative of the deceased, who alone is entitled to bring the action, would be clearly insufficient, and the defendant could treat it as a nullity. These considerations, that are fairly deduced from a reading of the statute, and other statutes in pari materia, point clearly to the conclusion that the cause of action does not accrue until the personal representative of the decedent has been duly appointed.'

'In the opinions delivered in the above case, reference is made to the decision in Barnes *v.* City of Brooklyn, 22 App. Div. 520, 48 N. Y. Supp. 36, as containing a correct statement of the rule of law here involved. In that case Mr. Justice Bradley said:

> 'The alleged cause of action in question resulted from the death of the plaintiff's intestate. It did not accrue

during his life, and until letters of administration were granted to the plaintiff there was no person in existence capable of bringing an action for the alleged cause. While the right of action was given by the death of the plaintiff's intestate, for the alleged cause of the death, no cause of action could accrue to any party until the appointment of his personal representative. The creation of that relation, therefore, would reasonably seem to be essential to the accruing of a cause of action. And such is the recognized import of the term. See the definition of 'accrue' in Burrill's Law Dictionary. In Murray *v.* East Indian Company, 5 Barn. & Ald. 204, it was held that a cause of action upon a bill of exchange, payable to the testator and accepted after his death, did not accrue until his personal representatives came into existence by taking letters of administration. And the Court of King's Bench, by Abbott, C. J., there said: 'Now, independently of authority, we think that it cannot be said that a cause of action exists, unless there be also a person in existence capable of suing.' The leading case in this state upon the subject is Bucklin *v.* Ford, 5 Barb. (N. Y.) 393, where the defendant was charged with the conversion of personal property of the estate of the plaintiff's intestate after his death. It was there held, as in the Murphy Case, supra, that the cause of action could not accrue until there was some person in existence capable of suing. Many cases are there cited in support of that rule. This proposition and the Bucklin Case are recognized, approved, and adopted in Everitt *v.* Everitt, 41 Barb. (N. Y.) 393, Dunning *v.* Ocean National Bank, 6 Lans. (N. Y.) 297, Id., 61 N. Y. 497, 503 (19 Am. Rep. 293), Sanford *v.* Sanford, 62 N. Y. 553, 555, Halsey *v.* Reid, 4 Hun, 778, and Cohen *v.* Hymes, 64 Hun, 56 (18 N. Y. Supp. 571). The only modification of this doctrine is found in the provisions of section 392 of the Code of Civil Procedure. Those provisions have no application to the present case.'

"In Louisville & N. R. Co. *v.* Sanders, 86 Ky. 259, 5 S. W. 563, it appeared that the statutes of Kentucky provided

that, "if the life of any person or persons is lost or destroyed by the willful neglect of another person, * * * the widow, heir or personal representative of the deceased shall have a right to sue * * * and recover punitive damages for the loss" (Gen. St. Ky. c. 57 sec. 3); that an action for an injury to the person "shall be commenced within one year next after the cause of action accrues" (chapter 71, art. 3, sec. 3); and that "if a person entitled to bring any of the actions mentioned * * * was, at the time the cause of action accrued, an infant, married woman, or of unsound mind, the action may be brought within the like number of years after the removal of such disability" (chapter 71, art. 4, sec 2). The deceased was killed in February, 1880. He left minor children, but no widow. Administration on his estate was taken out in March, 1880. The action was brought in April, 1885, by the minor children, more than five years after the death. It was held that the action must be brought within one year from the time the cause of action accrued, and that the statutory provision in behalf of the infant heirs was operative only where there was no person in esse, as a widow or administrator, who could sue. The court said:

> "The statute says that the suit shall be brought within a year after the cause of action accrues, and not thereafter. Whenever a party has done an act which makes him liable in damages, and his liability is complete, and there is one in esse who can sue therefor and recover, the cause of action has certainly accrued as against the defendant. * * * when Sanders was killed the wrong was done. When the administrator qualified there was a person in esse who had the right to sue for, recover, and receive the entire damages, leaving no longer in existence the cause of action. The statute then began to run not only against him, but against the cause of action.'
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> * * * * * * * * * * * * * *

"In view of the well-recognized rule heretofore pointed out as to when a right of action accrues—which Congress must have had in mind when enacting the present law—and

in view of the fact that Lord Campbell's Act, upon which the Employers' Liability Act was modeled, expressly provided that the limitation should run from the death of the injured party, and that, in the enactment of the present law, Congress declined to adopt such a limitation, and fixed the period from the time the action accrued, we are of the opinion that the proper construction of the statute is that the right of action did not accrue, so that the limitation attached, until the administrator was appointed, and that the the demurrer was properly overruled."

* * * * * * * * * * * * * * *

American Railroad Company of Porto Rico vs. *Coronas, 230 Federal 545.*

THE QUESTION HERE RAISED HAS NEVER BEEN PASSED ON BY THIS COURT.

The petitioner, in its argument, page 9, admits that the precise question here in controversy has never been directly passed upon by your Honorable Court. However, it is there argued that in *Missouri, Kansas & Texas Ry. Co.* vs. *Wulf, 226 U. S. 570, 33 Sup. Ct. 135, 57 L. Ed. 355, Ann Cas. 1914 B, 134,* this court assumed that the statute began to run from the date of death and not from the time of the issuance of letters on the estate of a decedent. It is submitted that the question as to when the cause of action accrued under the statute was not in issue or determined in the Wulf case. There the plaintiff, in her individual capacity instituted suit on January 23, 1909, to recover for the death of her son who was killed on November 27, 1908. On January 4, 1911, or more than two years after the date of the death, the plaintiff took out letters of administration on his estate and amended her pleadings by changing the name of the party plaintiff from Sallie C. Wulf to Sallie C. Wulf, Administratrix. Aside from the capacity in which the plaintiff assumed to bring her action, there was no substantial difference between her original and amended pleadings.

This court merely decided that the action under the Employers' Liability Act had been brought within two years

of the death, since the original petition pleaded injuries resulting in death while engaged in interstate commerce, and the cause of action is to be determined from the petition as originally filed and not from the capacity in which the party plaintiff sued. Therefore the amendment of the name of the party plaintiff was a mere change of form and not of substance, since it set up no different state of facts as the ground of recovery. This is far from holding, even inferentially, that the cause of action accrued at the time of death. This question was not in the Wulf case, because a suit within the purview of the statute had theretofore been brought within the two year period, requiring an amendment only as to a formal matter relating to the capacity of the party plaintiff.

The Wulf case was cited in both the Coronas and Guinther cases, supra, in support of the same contention here made by the present petitioner. However, in both of these cases, the contention was over-ruled. In the Coronas case the court said, page 553:

> "the question as to when the right of action under the statute accrued was not discussed or determined. The point decided was that, if the two years' limitation within which an action could be brought had terminated prior to the time the plaintiff asked leave to appear as administratrix, the desired amendment would not be the introduction of a new cause of action."

and a similar conclusion was reached in the Guinther case where it was said, page 87:

> "It is true that there are cases here and there that do so hold (that the cause of action accrues at death), but the Supreme Court has not gone so far, and by the great weight of authority, we are constrained to hold that under this statute the cause of action does not accrue until the appointment of a personal representative of the deceased who is capable of suing."

An amendment, merely expanding or amplifying that which was pleaded in support of a cause of action already

asserted, relates back to the commencement of the action and is not affected by the intervening lapse of time; but an amendment, introducing a new or different state of facts upon which recovery is predicated, is the equivalent of a new suit against which the statute will run. This is the controlling principle of the Wulf case and the other cases cited by the petitioner. However, as suggested by Circuit Judge Davis in the Guinther case, supra, page 87,when overruling a contention similar to the one here made by the respondent:

> "This is different from holding that, when there is nothing which a pleading may expand and to which 'it relates back,' the cause of action accrues at death, so as to start the running of the statute of limitations, before the appointment and qualification of a personal representative."

In view of the above it is respectfully submitted this court neither assumed nor decided in the Wulf case that the cause of action under the statute in question accrued at death.

The act under consideration is a remedial statute and as such should be liberally construed. However, it needs no liberal construction to support the judgment of the court below. Apt language providing that the limitation should run on the death of the injured party, as in Lord Campbell's Act upon which the act in question was modeled, would naturally have been used, if such had been the intention of Congress. If the petitioner's contention is correct, why use a phrase which on its face is manifestly ambiguous and productive of litigation when a simple, plain, unambiguous phrase used in statutes in many jurisdictions is ready at hand. The refusal of Congress to follow the phraseology of Lord Campbell's Act is therefore most significant. We must conclude that Congress in using the phrase "cause of action accrued" had in mind numerous decisions relating to limitation of actions herein referred to, establishing the principle that a cause of action is not complete until there is a person in existence capable of suing or being sued, until which time the statute does not run; or stated in other words, a cause of action includes not only a right proper but

the existence of a person by or against whom the process can issue.

This is the principle of the old English case of *Murray Admr.* v. *East India Company, 5 Barn. & Old. 204*, generally followed in this country by both the state and Federal courts. The early application thereof in Pennsylvania is found in the case of *Levering* v. *Rittenhouse, 4 Wharton, 120 (1839)*, where this court held that if a surety pays the debt of his principal after the death of the latter, and when no letters of administration have been taken out upon his estate, the statute of limitations does not begin to run until letters of administration are taken out. In reaching this conclusion Mr. Justice Kennedy for the Supreme Court of Pennsylvania on page 139 said:

> "But if Joseph was dead, at or before the time his father paid this money, and no letters of administration were ever taken out upon his estate, then the debt remained in force at the time of the declaration made by the father: because, there never having been any person such as an executor or administrator, in being, of whom this money, which had become a debt against the estate of Joseph, could be demanded, or who could be sued for it, the statute of limitations never could be said to have commenced running, and consequently could form no bar. It is only where the creditor may, and has a right to sue, that the statute commences running; but, as soon as that moment shall have arrived, it commences, and nothing can interrupt or prevent its running afterwards. See Stanford's Case, (5 Co. 123,) cited also in Saffyn *v.* Adams (Cro. Jac. 60-1,) which see also. Cary *v.* Stephenson, (Salk. 42; S. C. nom. Curry *v.* Stephenson, Carthw. 335; Skin. 555). Hickman *v.* Walter, (Willes Rep. 29). The East India Company, *v.* Murray's Admr. (5 B. & A. 204.) Geiger *v.* Brown, (4 M'Cord, 423)."

The case of Levering *v.* Rittenhouse, supra, was cited with approval in *Riner Admr.* v. *Riner Admr., 166 Pa. 617*, being an action brought by an administrator to recover money paid by an insurance company to a person who had no in-

surable interest in the life of plaintiff's intestate. Here again it was held that the statute of limitations began to run only from the date of granting of letters of administration to the plaintiff, and that in such cases the fact that there was gross laches in taking out letters of administration does not defeat the right of action.

Again in *Marstellar* v. *Marstellar, 93 Pa. 350* the Supreme Court of Pennsylvania said, page 354:

> "The statute does not begin to run until a right of action is complete. A cause of action does not exist unless there be a person in existence capable of suing or being sued."

citing Murray *v.* East India Company, supra, and other cases. The same rule is also followed in *Appeal of Amoles Administrators 115 Pa. 356.* Many other cases illustrating the application of this rule in statutory actions for death have heretofore been considered in the Coronas opinion.

Since under the act in question the suit to recover damages for death must be brought in the name of the personal representative of the deceased: *American R. R. of Porto Rico* v. *Birch 224 U. S. 547; St. Louis S. F. & T. R. R. Co.* v. *Seale 229 U. S. 156;* the relevancy of the above decisions to the question here at issue is apparent. Clearly, under the decisions heretofore quoted, until an administrator in the instant case was appointed no cause of action accrued.

The appellant in its argument attempts to limit the principle of the Murray case and the decisions following it to actions on contract, based upon valid consideration, where the debt sued for is due the estate of the deceased. We submit that these matters are merely incidental and are not controlling in the application of the rule. Whether the action is in assumpsit or trespass; for the benefit of an estate or certain specified persons is not material. A party indebted to an estate on a contract accruing after death is just as much prejudiced by delay in the bringing of a suit against him as the defendant in this case. Any interested party under the law may proceed for the appointment of a personal representative. The real question in any event

is whether or not there is a person in existence capable of suing or being sued. If there is not, the cause of action is incomplete and will not become complete or accrue until a person capable of instituting the action is raised. Whether assumpsit, or trespass under the Federal Act in question, until the appointment of an administrator there is no person capable of suing or guilty of laches in not suing. The effect of the doctrine of the Wulf case on this question we have heretofore discussed.

The petitioner in its argument, page 14, further suggests that the Federal Act in question is more than a statute of limitation because under it lapse of time not only bars the remedy but destroys the liability, citing in support thereof certain cases including *William Danzer & Co.* vs. *Gulf & Ship Island R. R. Co.*, decided June 8, 1925,——U. S.——, 69 L. ed. 720, 721. The respondent takes no exception to this familiar principle of law long applied to statutory causes of action for death by wrongful acts, including those arising under the Federal Employers' Liability Act. Such a statute is an offer of an action on condition that it be commenced within the time specified therein. However, the act itself fixes the limitation of two years from the date the cause of action accrues, and the cases heretofore cited are controlling in establishing the respondent's contention that the cause of action does not accrue until the appointment of the administrator.

The Petitioner argues (page 22) that "so far as the defendant is concerned, its liability for negligence accrued on the day of the unfortunate accident which resulted within a few hours thereafter in the death of its employe, at which time the surviving parents, the real parties in interest, sustained their loss." In answer to this we submit that no action under the statute could properly accrue until the death, and when the death occurred manifestly no party was in existence authorized to sue. Thus a situation was created in exact accordance with the principle of the Murray case supra. If it was in the power of the surviving father to take out letters, as suggested by the Petitioner, it was also within the power of the Petitioner to force the taking out of these letters, if it so desired, and any delay in so doing, as decided in the cases heretofore cited, does not defeat the action.

To the statement filed in the first suit brought by the surviving parents under the state law, no affidavit of defense was filed. It was more than two years after the date of death before this first case came to trial. Not until then did the plaintiffs learn of the defendant's contention that the deceased, at the time the injuries were sustained, was engaged in interstate commerce. Now the Petitioner suggests that the plaintiffs, instead of amending the original action by substituting the administrator as plaintiff in place of the surviving parents, elected to stand on the suit as brought and therefore the present action is barred.

In reply thereto the respondent submits that it is to plaintiff's statement alone and not to the name of the party plaintiff, to which we look for the cause of action: *Hogarty v. P. & R. Ry. Co. 255 Pa. 236; Seaboard Air Line Ry. Co. v. Renn, 241 U. S. 290; Atlantic Coast Line* vs. *Burnette, 239 U. S. 198.* The statement filed in the suit by the surviving parents—printed at the end of this argument, page 23, and before the Supreme Court of Pennsylvania in both appeals—was under the statute in force in Pennsylvania and did not plead the Act of Congress nor any facts bringing the case within said act, as there was nothing therein indicating that the employer was operating a line of railroad from one state to another, or that the deceased, at the time the injuries were sustained, was engaged in interstate commerce. Therefore, under the cases last cited the plaintiff could not so amend at the first trial, since the two year limitation has already run, and a new cause of action would have been introduced. The Hogarty case was decided by the Supreme Court of Pennsylvania in October, 1916, and it was under the doctrine of this case that no attempt was made to amend or would have been permitted.

The petitioner also argues that to sustain this judgment would work a hardship on it. The respondent's statement of the case shows that the delay was mostly on the part of the defendant and that the plaintiffs have diligently pressed their rights. Truly it would be a travesty on justice if the petitioner by the concealing of its defense, which was peculiarly within its own knowledge, until over two years after the death, could then escape all liability by pleading a remedial statute. The defendant kept silent for

two years—if not actually misleading the plaintiffs—while the first action was pending, when a word from it and the plaintiffs could have perfected their rights. It is true that the petitioner was within its rights in thus acting, but such conduct has a bearing on the hardship argument now advanced by it. The distinction between interstate and intrastate movements is subtle and refined. The railroad alone possesses the facts on which depends the choice of actions, either under the state law or under the Federal law. If the railroad chooses to keep silent, as in this case, it escapes all liability, should the plaintiff be so unfortunate as to make the wrong guess, unless the well settled rule, that a right of action does not accrue until there is a party in being capable of suing, is recognized.

Under petitioner's contention as to the construction of Section 6 of the Act in question, the deceased employee in the instant case might have left a child of tender years as his sole survivor and, although the Employers' Liability Act was passed for the protection of that child, laches would be imputed to it and all right to recover damages lost, should no suit be instituted on the infant's behalf within two years from the date of death, even though it had no guardian to protect its interests and no personal representative of the deceased had been raised. Under a remedial statute how can it be said that the defendant's liability to answer in damages to this minor child had become perfect and complete, when there was no person in existence to whom the damages can be paid or who was empowered to sue for the recovery of the same. Manifestly such a construction would not only be without the spirit but also without the letter of the statute and at variance with the numerous decisions heretofore cited.

The respondent submits that the principle of the Coronas case here controls and that the judgment in question should be affirmed.

Respectfully submitted,

PAUL G. SMITH,

JOHN R. GEYER,

Counsel for Respondent.

STATEMENT FILED BY SURVIVING PARENTS IN FIRST ACTION

John L. Koons and Malinda Koons *vs.* Philadelphia & Reading Railway Company.	In the Court of Common Pleas of Dauphin County. No. 410, June Term, 1916.

Plaintiff's Statement

This action is brought by the plaintiffs to recover damages from the defendant in the cause of action of which the following is a more specific statement.

(1) That on or about the 22d day of April, 1915, Lester M. Koons, a son of the plaintiffs, was employed by the said defendant Company in the capacity of a laborer in and about the railroad being operated by the said defendant between the City of Harrisburg and the City of Philadelphia, at a point near the City of Harrisburg, commonly known as the Rutherford Yards.

(2) That being thus employed the said Lester M. Koons was by the said defendant assigned under the charge, supervision and direction of one George Zimmerman, who was the person in charge of and directing the particular work in which he was engaged, and to whose orders the said Lester M. Koons was bound to conform, as were also the fellow-servants at the time working with him.

(3) That on the said day the said Lester M. Koons, being thus employed, was directed, with his fellow-servants, by the said George Zimmerman, to undertake the unloading of a certain freight car on which there were portions of another car which had been wrecked; he, the said George Zimmerman, superintending the work and directing the appliances to be used, and the manner of employing them, and the movements of the men.

(4) That it then and there became the duty of the said defendant to furnish to the said Lester M. Koons and his fellow-servants a reasonably safe place to work and reasonably safe and suitable appliances for the doing of the said work, and a manager, foreman or person in charge of the work, who should use due care in superintending the same, and in performing all the duties owing from the said defendant to the said Lester M. Koons and his fellow-servants, and who should use due care in giving orders and instructions to the said Lester M. Koons and his fellow-servants, and in furnishing to them the proper appliances.

(5) That its duties in the premises wholly disregarding, the said defendant, by its vice-principal, the said George Zimmerman, did order, instruct, and direct the said Lester M. Koons and his fellow-servants to undertake the work of unloading from the said car a large frame or portion of another car by means of a crane or tackle, and did then and there carelessly and negligently provide a certain appliance, to wit a chain with certain "dogs" or hooks attached to be used for the lifting of the said portion of a wrecked car from the other car, despite the fact that the said Lester M. Koons and his fellow-servants or either or certain of them, protested that the said appliance was not a proper appliance for the use contemplated, and was not safe, and despite the fact that another appliance, to wit certain chains which could be passed around the said material to be moved, were available, which were the better adapted for the purpose, and which they suggested should be used; but that thereupon the said defendant, by its vice-principal, the said George Zimmerman, did carelessly and negligently order, direct and instruct the said Lester M. Koons and his fellow-servants, to attach the said "dogs" or hooks, and did carelessly and negligently order that the material be thereby lifted and did carelessly and negligently order the said Lester M. Koons into a dangerous place, thus by his negligence created, to assist in so doing.

(6) That as a result of this carelessness and negligence, when the said part of a car came to be lifted, one of the "dogs" or hooks on the said chain slipped, thereby causing

the load to rapidly shift its position, or slip, striking the said Lester M. Koons upon the head, and causing his death within a short time thereafter.

(7) That the said Lester M. Koons was unmarried and without issue, and that during his life-time he performed numerous acts of service and assistance to the plaintiffs, his parents. That although over the age of twenty-one, he continued to perform these acts of service and assistance, and from time to time contributed for their aid, comfort and support large sums of money, and had he lived would from time to time, so long as he lived or they lived, or either of them lived, have continued to perform the said acts of service and assistance, and to contribute sums of money to them. That he was at the time of his death and shortly before, able to earn and did earn, large sums of money.

(8) That by reason of this wrongful conduct of the said defendant, they have been compelled to expend large sums of money in the payment of funeral and burial expenses and have lost his aid, comfort and assistance, as well as the sums which he from time to time contributed and would likely have contributed during the terms of their natural lives and the life of Lester M. Koons and the life of either of them. To recover all of which in the sum of Five Thousand ($5,000.00) Dollars, this action is brought.

(9) That said Lester M. Koons left to survive him no wife or issue, but parents, the plaintiffs, in whose name and for whose use this action is brought.

(10) And of all these matters and things the said plaintiffs demand trial by jury.

FOX & GEYER,
Attorneys for the Plaintiff.

STATE OF PENNSYLVANIA,
COUNTY OF DAUPHIN } *ss:*

Personally appeared before me, the undersigned, a Justice of the Peace in and for the State and County aforesaid, the above named John L. Koons and Malinda Koons, who

being duly sworn according to law, do depose and say that the facts in the foregoing statement set forth are true and correct.

JOHN L. KOONS,
MALINDA KOONS.

Sworn and subscribed to before me this 16th day of Sept., 1916.

JACOB H. BALSBAUGH, J. P.

My commission expires January 1, 1918.

ENDORSEMENTS

COURT OF COMMON PLEAS OF DAUPHIN CO., PA.

410 June Term, 1916.
John L. Koons and Malinda Koons

vs.

Philadelphia & Reading Railway Co.
Filed Sept. 19, 1916.

PLAINTIFF'S STATEMENT

To the within Defendant:

You are required to file an affidavit of defense to this statement of claim within fifteen days from the service hereof.

FOX & GEYER,
Attorneys for Plaintiff,
802 Kunkel Building,
Harrisburg, Pa.